85-497

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In Re Charges of Unprofessional Conduct Against N.P.,
Appellant.

JURISDICTIONAL STATEMENT

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THE PARTIES

The parties to this proceeding are as follows:

Appellant, whose name may not be identified pursuant to the Minnesota Rules on Lawyers Professional Responsibility Rule 20, Appendix D; and the Director and members of the Minnesota Lawyers Professional Responsibility Board, a Board established by the Minnesota Supreme Court.

Because 28 U.S.C. Section 2403 (b) may be interpreted as applicable to this appeal, a copy of the notice of appeal was served on the Attorney General of Mnnesota; and a copy of this Jurisdictional Statement will be served upon him.

QUESTIONS PRESENTED

1. Whether the State Supreme Court deprived appellant, an attorney, of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution by attributing to appellant responsibility for the delay in the lawyer's grievance proceedings against appellant when (a) State rules do not impose a duty on appellant to expedite the proceedings; (b) appellant's actions in producing the delays were solely under orders of the Minnesota Supreme Court and solely designed to protect appellant of his rights under the United States Constitution; and (c) appellant's actions in producing the delays resulted from the exercise of his right under the First Amendment to the United States Constitution to petition for a redress of grievances.

2. Whether the State deprived appellant, an attorney, of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution by failing to apply against the Minnesota Lawyers Professional Responsibility Board the Board's rule, established by the State Supreme Court, wherein the rule requires a prompt disposition of investigations relating to attorneys.

3. Whether the State Supreme Court deprived appellant of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when that State Court deferred ruling on appellant's constitutional rights and held instead that the proceedings are at a preliminary stage.

4. Whether the State Supreme Court deprived appellant of his right to due process of law as guaranteed by

the Fifth and Fourteenth Amendments to the United States Constitution when it failed to dismiss charges filed against appellant in the attorney's disciplinary proceedings although: (a) each charge against appellant contains multiple, discrete allegations, viz., charge 1, three allegations; charge 2, five allegations; charge 3, three allegations; charge 4, four allegations; charge 5, three allegations; (b) the MRLPR deprives appellant of due process of law because the rules fail to provide procedural devices for authoritative rulings on appellant's constitutional arguments and issues arising under the United States Constitution during the investigation and before the charges are made public; (c) the multiple, duplicitous allegations against appellant in the adversary stage of the preliminary, non-public panel hearing, deprive appellant of due process of law because they fail to state specific, discrete allegations; (d) the State discipline rules for attorneys deprive appellant of due process of law because DR 1-102 (A) (5); 1-102 (A) (6); 2-103; 5-105; and 5-106 are unconstitutional and have not been specifically interpreted by the Minnesota Supreme Court and should be given prospective effect only and not made applicable against appellant.

5. Whether appellee Director, Minnesota Lawyers Professional Responsibility Board, is depriving appellant of his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by proceeding with the discipline action against appellant although the discipline rules forming the basis for the present proceedings were repealed by the Minnesota Supreme Court on August 31, 1985.

6. Whether appellant is being deprived of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments, and the *ex post facto* clause of Article I, Section 10, Clause 1 of the United States Constitution by applying and enforcing the Minnesota Code of Professional Responsibility made effective September 1, 1985, long after the dates of the occurrences alleged in the charges against appellant.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota was issued on January 25, 1985 and is set forth in Appendix C. (App. 1) and is reported at 361 N.W.2d 386 (1985). The order denying appellant's petition for rehearing in the State Supreme Court is set forth in Appendix A (App. 34). The order of the State Court's denial of appellant's motion for stay pending review by this Court is set forth at Appendix B (App. 36). The charges against appellant were filed on May 8, 1984 and are set out in Appendix F (App. 20), are not officially reported, and are at this stage technically confidential, according to Rule 20, MRLPR, Appendix D (App. 45).

JURISDICTION OF THIS COURT

Appellant appeals to this Court from a final order of the Minnesota Supreme Court wherein that Court denied appellant's requested relief against the Minnesota Lawyers Professional Responsibility Board because of charges filed against appellant for discipline because of alleged actions

undertaken by him in his professional capacity as an attorney.

The first two questions presented to this Court involve the Minnesota Supreme Court's order (1) attributing to appellant delays in the investigative procedure in violation of appellant's rights under the U.S. Constitution and (2) exonerating the Minnesota Lawyers Professional Responsibility Board of its delay although its own rule, issued by the State Court, requires prompt disposition.

The third question involves appellant's constitutional right to procedural due process. and the state court erred in deferring ruling on those constitutional rights because the proceedings are held to be at a "preliminary stage." (App. 14).

The fourth question involves the actual charges against appellant; and they are duplicitous because of charging multiple, dissociated allegations in each charge; the duplicitous allegations deprive appellant of due process of law for failure to state specific allegations that would enable the appellant to defend and a court to review; and specific rules are unconstitutionally vague in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The fifth question raises the constitutional right of the appellant to have the charges dismissed against him because the discipline rules forming the basis of the charges against appellant were repealed on August 31, 1985.

The sixth question raises the issue of whether the State Supreme Court is barred from applying the rules of professional conduct, made effective September 1, 1985, retroactively in violation of the *ex post facto* clause of the United States Constitution.

This Court has jurisdiction to review the state court decision by reason of 28 U.S.C. Section 1257 (2), which grants to this court jurisdiction by appeal from a state court order which involves the validity of statutes of a state and their repugnance to the Constitution of the United States. Matters reviewable only by certiorari, 28 U.S C. Section 1257 (3), as herein discussed should be included with the appealable issues.

This Court has sustained jurisdiction on an analogous attorney's discipline case on reviewable issues arising under the United States Constitution, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U.S. ——, 105 S.Ct. 2265 (1985).

This Court reviewed by appeal, *Lathrop v. Donohue*, 367 U.S. 820 (1961) the rules issued by the Wisconsin Supreme Court whereby it integrated the Wisconsin Bar Association.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The United States Constitution, Article I provides in part:

> Congress shall make no law * * * abridging the freedom * * * or the right of the people * * * to petition the Government for a redress of grievances.

United States Constitution, Amendment 5, provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The United States Constitution, Amendment 14, provides in pertinent part:

> * * * nor shall any State deprive of any person of life, liberty, or property, without due process of law * * *.

The United States Constitution, Article I, Section 10, clause 1 provides in part:

> No state shall * * * pass any * * * ex post facto law * * *.

The pertinent provision of the Code of Professional Responsibility of Minnesota are set forth in Appendix E (App. 47).

The pertinent provisions of the Minnesota Rules on Lawyers Professional Responsibility are set forth in Appendix D (App. 37).

The pertinent provisions of the Minnesota Rules of Professional Conduct are set forth in Appendix G (App. 54).

STATEMENT OF THE CASE

1. Statement of Facts

Appellant brings before this Court the charges presently filed against appellant as an attorney for alleged violations of the Minnesota Code of Professional Responsibility.

Appellant N.P., whose identity is confidential, Rule 20, Minnesota Rules on Lawyers Professional Responsibility, Appendix D (App. 45) has been admitted to practice before the Bar of the Minnesota Supreme Court and lower courts of that State since 1949, he has been admitted to practice before the Bar of this Court and various United States Courts of Appeals for various circuits and the United States District Court for different districts. Appellant's office is located in Minneapolis, Minnesota, where he is engaged primarily in the representation of plaintiffs in per-

sonal injury claims. Before the present proceedings, appellant had had no experience with the disciplinary process.

On January 20, 1983, the appellee director of Lawyers of Professional Responsibility filed with the United States District Court in *Application of the Director of Lawyers Professional Responsibility,* Cr. No. 3-82-32, United States District Court, District of Minnesota, a motion for disclosure of the Grand Jury transcripts, documents obtained by a grand jury subpoena, and exhibits received in evidence at trial.

On March 18, 1983, appellee director filed an amended motion for disclosure.

Rule 25 of the Rules on Lawyers Professional Responsibility, RLPR. Appendix D (App. 46). provides that any lawyer must cooperate.

The United States District Court on September 16, 1983 ordered certain documents produced and deferred ruling on this appellant's argument that the duty to cooperate is unconstitutional.

Charges of unprofessional conduct against appellant were served on May 8, 1984.

On May 31, 1984, appellee requested, pursuant to Rule 25, MRLPR, appellant to provide discovery.

On June 1, 1984, appellee served on appellant requests for admissions, pursuant to Rule 9 (c), RLPR, Appendix D (App. 39). On June 6, 1984, appellant initiated this litigation by filing in the Minnesota Supreme Court a petition for writ of prohibition. This petition contended that Rule 25, MRLPR, is unconstitutional.

On July 6, 1984, the Minnesota Supreme Court granted appellant's motion for a stay of all disciplinary proceedings pending resolution of appellant's petition then pending.

On July 9, 1984, appellant filed a supplemental petition on the unconstitutionality of Canon 9, Minnesota Discipline Rules 1-102, 2-103, 5-105, and 5-106 and the charges.

On January 25, 1985, the State Supreme Court issued its memorandum opinion. Appendix C (App. 1).

On February 5, 1985, appellant filed a timely petition for rehearing before the State Supreme Court.

On July 17, 1985, the State Supreme Court entered an order denying the petition for rehearing. (App. 34).

On August 1, appellant filed a timely notice of appeal and served appellee and the Attorney General of Minnesota. (App. 35).

Appellant timely docketed this appeal.

This jurisdictional statement is timely filed.

2. Statement of the Case.

Procedural Posture. Appellant is the subject of an investigation by the Minnesota Lawyers Professional Responsibility Board. The proceedings are confidential at this stage, wherein the appellee director has filed charges against appellant, and those charges are to be submitted to a Panel, pursuant to Rule 9, MRLPR, Appendix D (App. 39).

Appellant sought and obtained review in the State Supreme Court on original petitions on each of the issues presented in this appeal. The State Court considered each issue and ruled against appellant in the original proceedings and in the order denying the petition for rehearing.

i. The State Supreme Court deprived appellant of constitutional due process by attributing to appellant the delays in the lawyers grievance proceedings. (Question 1).

Rule 2, Minnesota Rules on Lawyers Professional Responsibility provides that charges of "unprofessional conduct promptly be investigated and disposed of."

This rule imposes no obligation on appellant as the attorney under investigation to expedite the proceedings. Appellant's actions in producing delays were solely in seeking protection of rights under the United States Constitution.

The responsibility to expedite disciplinary proceedings rests solely with the enforcing agency. *The Florida Bar v. Pappy,* 358 S.2d 4 (Florida 1978).

The records before the State Supreme Court demonstrated that the appellee received a complaint in 1979 against appellant for allegedly having solicited lawsuits on behalf of women who had sustained personal injuries as a result of having used the intrauterine device known as the Dalkon Shield. The Director dismissed those complaints in 1979. In 1982, appellant was indicted by a United States Grand Jury in connection with alleged violation of the United States mail fraud statute for alleged solicitation of clients, conflicts of interest, division of legal fees with laymen, all issues presently involved in the charges against appellant. The extensive publicity on that indictment was known to appellee. After a lengthy trial, appellant was acquitted on November 25, 1982. In January, 1983, appellee sought from the United States District Court the grand jury documents. Appellant objected to those disclosures under Rule 6 (e) F.R.Civ. P., on among other

grounds the prosecutorial misconduct involved in the grand jury proceedings. *Sells, Inc. v. United States,* 642 F.2d 1144 (9th Cir. 1981); *United States v. Sells Engineering, Inc.,* —— U.S. ——, 103 S.Ct. 3133 (1983); *Sells, Inc. v. United States,* 719 F.2d 985 (9th Cir. 1983); *In the Matter of Grand Proceedings Miller Brewing Company,* 687 F.2d 1079, 1086 (7th Cir. 1982).

On May 8, 1984, appellee filed the charges of unprofessional conduct against appellee.

The only delays *caused* by appellant were those by orders of the State Supreme Court.

The State Supreme Court rejected appellant's argument about unreasonable delay, calculated that the actual investigation had been commenced four years before the charges were filed, and described it as "a lapse of time still substantially longer than the average attorney disciplinary investigation * * *." Appendix C (App. 8). The Court ruled that there was no prejudice to appellant and "* * * that much of the reason for delay is attributable to petitioner's own actions since September, 1982 in resisting the director's investigation. Appendix C (App. 9).

Appellant established in the Court below a litany of examples of prejudice. Furthermore, the Court deprived appellant of his right to due process of law by attaching a penalty for the delay which appellant caused solely through court orders and solely because of his attempt to obtain his constitutional right to substantive and procedural due process. This Court has held, *Spevack v. Klein,* 385 U.S. 511 (1967) that the courts may not impose sanctions which make the assertion of a constitutional privilege "costly" in an attorney's discipline proceedings.

ii. The State Supreme Court deprived appellant of due process of law by failing to apply against appellee the rule requiring prompt disposition of this case. (Question 2).

The State Supreme Court erred in omitting its own rule in determining delay in appellant's case.

The State Supreme Court did not mention, cite, or construe Rule 2, RLPR, which requires allegations of attorney's unprofessional conduct be "promptly investigated and disposed of."

Agencies are bound by their own regulations. *Vitarelli v. Seaton,* 359 U.S. 535, 540 (1959). See also *United States v. Shaughnessy,* 347 U.S. 260, 265 (1954).

The Director extended the delay to approximately 4 years. This is patently in violation of the rules. It has been held that "it is elemental that action beyond the scope of a body's own procedural regulation is a violation of due process of law." *Behagen v. Intercollegiate Conference of Faculty Representatives,* 346 F.Supp. 602, 606 (D.C. Minn. 1972).

What the State Supreme Court has done is attach an impermissible penalty for appellant's having successfully obtained delays in the courts. *Blackledge v. Perry,* 417 U.S. 21, 28-29 (1974). A person may not be deprived of access to courts to secure judicial protection of constitutional rights. *Talley v. Stephens,* 247 F.Supp. 683, 686 (D.C. Ark. 1965). The right to petition for redress of grievances includes access to the courts under the First Amendment. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

To the extent that the State Supreme Court held that appellant had contributed to the delay, to that very extent

the Court deprived appellant of his right to seek in the courts a redress of grievances.

iii. The State Supreme Court erred in avoiding ruling on certain constitutional issues on the grounds that they were preliminary. (Question 3).

The State Supreme Court's opinion held that the present proceedings against appellant involved a "preliminary nature of the charges", (App. 14), and held further that those charges need not comply with the "stricter standard we would apply to charges in a formal opinion but simply must give [appellant] a general idea of what actions are being challenged." (App. 14).

The posture of the case against applicant is an adversary proceeding, not a preliminary review of the file.

Rules on lawyers professional responsibility provide for the filing of the charges, notification of the attorney, and admission of some or all of the charges by the attorney. Rule 9. That same rule provides in (c) and (d) for discovery by admissions and depositions and a pre-hearing between the director and applicant to arrive at stipulations, simplification of issues, and marking of exhibits. (App. 39-44).

Thus, this is an adversary hearing. The State court erred in failing to apply the stricter standard of a formal petition.

This issue is of importance to the bar throughout the United States in respect to the procedural and substantive due process of attorneys in a discipline proceeding. The State Supreme Court erred in a very fundamental and prejudicial fashion in failing to recognize the adversary nature of the present proceedings. See *Morgan v. United*

States, 304 U.S. 1, 20 (1938). *United States v. Abilene and S. Ry. Co.,* 265 U.S. 274 (1924).

The Constitution is applicable to administrative actions "* * * to afford those affected by the action the traditional safeguards of due process." *Greene v. McElroy,* 360 U.S. 474, 506 (1959).

The Court's opinion deprived appellant of due process of law.

iv. The duplicitous charges against appellant deprive him of due process of law. (Question 4).

The charges as presently filed against appellant are grotesque. An oversimplification involves the obvious, that each charge involves multiple allegations against appellant: Charge I alleges 3 separate violations; Charge II alleges 5 separate violations; Charge III, 3; Charge IV, 4; Charge V, 3. (App. 20-31). Each allegation involves a preliminary statement, exhibits, and the charging paragraph, or in several counts, several charging paragraphs. Each charge involves allegations totally dissociated from the other allegations in the same charge.

Charge I for example alleges that appellant directed attorney Stephen Eckman to subvert the disciplinary investigation in violation of the discipline rules. (App. 22). However, the exhibit attached to that charge includes Eckman's affidavit that he was instructed by appellant to have each of the clients from the Duluth, Minnesota—Superior, Wisconsin area "* * * sign a document confirming that [appellant] and his agents had not solicited the client's case * * *;" and that appellant directed Eckman to dictate "* * * a strong letter to the doctor * * * to hopefully dissuade the doctor from his complaint * * *." The affidavit contradicts the allegation. (App. 66, 67).

Charge I alleges that appellant violated the discipline rules by solicitation of cases, payment of referral fees, and altering records to hide referral fees so as to subvert the disciplinary investigation. (App. 23).

Charge II in the preliminary statement asserts that appellant represented Dalkon Shield clients and alleges that the insurance representative "* * * regularly advised [appellant] as to additional work needed on these files to enhance the value of the claims." (App. 25). There certainly is nothing unusual about that. An exhibit supporting charge No. II asserts that that insurance agent stated that the insurance company was paying on Dalkon Shield claims and that some attorneys were getting fees of 50% on the claims. (App. 68). The exhibits directly contradict the allegation.

Charge II (App. 25, 26) alleges the following dissociated violations: appellant undermined the representative's loyalty to his insurance company; appellant's receipt of confidential information subverted the adversary systems; appellant's conflict of interest was to the detriment of clients, the insurance company, the insured, and the legal system; appellant's failure to disclose his employment of the representative breached his fiduciary duty; his settlement of claims with the representative jeopardized the settlements.

Charge III (App. 26-27), alleges that appellant represented 318 Dalkon Shield clients; that 26 clients, not identified, received settlement checks; it charges that appellant participated in "five block settlements", in violation of Dr 5-106 which refers to "aggregate settlements" and not group or block settlements. Charge III has separate allegations of appellant's failure to communicate with

his clients, failure to obtain his client's consent for settlement, and making block settlements.

Charge IV (App. 29-30) cites appellant for failure to maintain trust account monies, failure to pay to clients the interest earned on client monies, failure to separate client funds from law firm funds, and failure to maintain books and records.

Charge V, (App. 31) like the preceding four charges, has multiple, discrete allegations that appellant undermined insurance agents' loyalty to their insurance company, created a conflict of interest for the adjusters, and took advantage of them to the detriment of the appellant's clients, the insurance companies, the insureds, and the legal system, and charged clients for expenses not incurred and thereby converting clients' monies.

The charges are multiple in each count. The charges in each count are inconsistent with their preliminary statements in part, and they are contradicted in part by some of the exhibits.

The Minnesota rules fail to provide for dismissing multiple, duplicitous, contradictory, or unconsitutional allegations, exhibits, and charges. The State Supreme Court failed to establish what portion of each charge must be validated to issue discipline. Furthermore, the Court violated appellant's constitutional rights by holding that this was only a "preliminary investigation." (App. 14). This Court should accept review because of the precedent which this sets for duplicitous charges in discipline proceedings.

The multiple allegations make impossible the effective judicial review of a finding of discipline. The absence of totally separate and identifiable allegations presents a constitutional deficiency in the standard of proof and the

possibility of reaching any standard for each separate discipline violation. This is of critical importance to the Bar. This Court held, *United States v. Cruikshank*, 92 U.S. 542, 558 (1976), that the purpose of specificity in criminal indictments is in part "* * * to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." See also *Russell v. United States*, 369 U.S. 749, 768 (1962). This Court has never ruled on the specificity required in attorney discipline proceedings. The importance to the Bar in general is manifested by the importance of the result if there be a finding of discipline. There could be no effective judicial review because of the contradictions from the affidavits and exhibits and the charging allegations, between the contradictory or inconsistent or discrete allegations in each of the charging sections.

Attorneys are entitled to due process of law in any discipline proceeding. *Ex Parte Garland*, 4 Wall. 333, 71 U.S. 366, 370 (1867). The court should apply to appellant's allegations the principle enunciated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U.S. ——, 105 S.Ct. 2265, 2283 (1985), regarding vague discipline rules and due process concerns. Certain it is that the Court should review the charges in this case to determine whether they reached that specificity required under due process whether considered by the Fifth Amendment to the United States Constitution or as in criminal cases, the Sixth Amendment, and the Fourteenth. *Faretta v. California*, 422 U.S. 806, 818 (1975).

v. The State Court erred in sustaining the constitutionality of certain discipline rules. (Question 4).

Appellant in the original proceedings before the State Supreme Court attacked the constitutionality of certain discipline rules which were cited in the charges filed against appellant. Those discipline rules are DR 1-102 (A) (5) and (6); DR 5-105; and DR 5-106.

DR 1-102 (A) (5) and (6) provide that an attorney shall not engage in conduct prejudicial to the administration of justice or engage in any conduct adversely reflecting on one's fitness to practice law. The State Supreme Court held that they "* * * do no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the court has a duty to deal fairly with the court and client. This duty embraces all of the ethical strictures of the Code of Professional Responsibility." (App. 15).

The State Court considered DR 5-105, which requires an attorney to decline employment if the exercise of his independent professional judgment for a client will be or is likely to be adversely affected by the acceptance of the proffered employment. The Court rejected appellant's attack and stated that "the words of the rule 'will or is likely to be adversely affected' indicate that an attorney sensitive to fiduciary obligations will err, if at all, on the side of rejecting questionable employment." (App. 18).

The State Court considered DR 5-106, which prohibits an attorney from engaging in "an aggregate settlement" unless each client has consented to the settlement after having been advised of the existence and nature of all the claims. The State Supreme Court stated that appellant,

> Particularly when viewed in the general context in which the rule was invoked, we find it most difficult to see how [appellant] was misled or misinformed. In any event, the complete text of the rule needs no parsing of words and phrases to clearly inform an attorney as to the kind of conduct that is prohibited. (App. 19).

This Court's recent decision in *Zauderer v. Office of Disciplinary Counsel of the State of Ohio, supra,* indicated vagueness may preclude any discipline greater than a reprimand. Footnote 15, —— U.S. ——, 105 S.Ct. at 2283.

These discipline rules are vague. There is nothing comprehensible to the charges of conduct "* * * prejudicial to the administration of justice" or conduct that "* * * adversely reflects on his fitness to practice law." DR 1-102 (a) (5) and (6). Totally unmeasureable is DR 5-105 (a), which requires an attorney to decline proffered employment "if the exercise of his independent professional judgment * * * will be or is likely to be adversely affected * * *." There has been no judicial uniformity in the definition of "aggregate settlement" which is the essential part of DR 5-106.

This Court has rejected incomprehensible standards imposed on lawyers. In *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957), the applicant for the bar had been rejected for failing to prove his good moral character. The term was held to be "unusually ambiguous." 353 U.S. at 263. This Court set the standard of rejection by pointing out that the phrase there could have been defined in any unlimited number of ways to "* * * reflect the attitudes, experiences, and prejudices of the definer." *Ibid.* Phrased another way, the Court stated that "such a vague

qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrumentality for arbitrary and discriminatory denial of the right to practice law." *Ibid.* Mr. Justice Brennan in *Zauderer,* in concurring in part and dissenting in part, stated that:

> A regulation that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essentials of due process of law.' —— U.S. ——, 105 S.Ct. at 2289.

The due process right to a specific discipline rule should be reviewed by this Court. The 7th Circuit has invalidated a regulation barring "conduct unbecoming a member and detrimental to the service" because it has "* * * no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned." *Bence v. Breier,* 501 F.2d 1185, 1190 (7th Cir. 1974).

THE STATE SUPREME COURT REPEALED THE DISCIPLINE RULES FORMING THE BASIS OF THE CHARGES AGAINST APPELLANT (Question 5).

The State Supreme Court on June 13, 1985 entered an order which considered the American Bar Association Model Rules of Professional Conduct as recommended by the Minnesota Bar Association. The Court then entered an order:

> Now, therefore, it is hereby ordered that the attached Minnesota Rules of Professional Conduct are adopted as the standard of professional responsibility for lawyers admitted to practice in Minnesota, effective September 1, 1985, and

> It is further ordered that the existing Minnesota Code of Professional Responsibility as adopted by the Minnesota Supreme Court on August 4, 1970, is hereby repealed, effective August 31, 1985. (App. 54-55).

a. The absence of a saving clause effectively repeals the existing Code of Professional Responsibility.

The State Supreme Court clearly did not make any attempt at preserving the present discipline rules because of its order actually repealing the rules. There is no rule from the Minnesota Supreme Court for a saving of existing regulations after the effective date of the repeal. Minnesota has a statute regarding the saving of statutes after that repeal, but the State Supreme Court, in *Larson v. Independent School District No. 314,* 305 Minn. 358, 233 N.W.2d 744 (1975) held that the amendment to the Minnesota Rules of Civil Procedure were applicable to pending cases and that the Minnesota Saving Statute did not apply in the construction of the court rule. This flows only naturally from that Court's ruling that the Constitution of the State of Minnesota and the inherent power of the judiciary reserved to the State Supreme Court the issuance of rules of practice. *Petition for Integration of Bar of Minnesota,* 216 Minn. 195, 12 N.W.2d 515, 518 (1943).

b. Repeal or change governing rules pending judicial review requires implementation only of the new rules.

The Minnesota Supreme Court, in *Larson v. Independent School District No. 314,* 305 Minn. 358, 233 N.W.2d 740, 747 (1975) is in agreement with the uniform principle

that a new rule or regulation during judicial review is implemented to control pending litigation. See *State Ex Rel. Bennett v. Brown,* 216 Minn. 135, 12 N.W.2d 180, 181 (1943).

See *State v. Coolidge,* 282 N.W.2d 511, 514 (Minn. 1979), where the state court there cited as its authority this court's opinion in *Bell v. Maryland,* 378 U.S. 226 (1964), which considered a conviction of some black students in Maryland for their having participated in a "sit-in" demonstration at a restaurant in 1960. During the appeal process, the State of Maryland enacted laws abolishing the crime, that is repealing the statute. This Court per Justice Brennan stated:

> * * * For Maryland follows the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it. 378 U.S. at 230.

c. The new Minnesota Court rules cannot be applied retroactively. (Question 6).

The charges filed against appellant relate to events which occurred before the filing of the charges in May, 1984, and therefore patently before the implementation of the new rules of professional conduct, which are made effective on September 1, 1985. The new rules, whether identical or similar to the Minnesota Rules on Lawyers Professional Responsibility, cannot be made retroactive.

United States Constitution, Article I, Section 10, Clause 1, provides in part that "No State shall * * * pass any * * * ex post facto law."

This Court, per Justice Marshall, in *Weaver v. Graham,* 450 U.S. 24, 28 (1981) stated that,

> The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'

The State Supreme Court could not now interpret rules or its implementing order for the new rules of professional conduct and thereby make them retroactive when such a judicial decision would enlarge the scope of the new rules. See *Camitsch v. Risley,* 705 F.2d 351, 355 (9th Cir. 1983).

While it might be suggested that the *ex post facto* proscriptions apply only to criminal cases, *Randall v. Reynoldson,* 640 F.2d 898 (8th Cir. 1980), *cert den.* 454 U.S. 880, it should be kept in mind that a lawyer's discipline proceedings are quasi-criminal. *In Re Ruffalo,* 390 U.S. 544, 551 (1968).

It is therefore clear that appellant is not subject to discipline proceedings under the September 1, 1985 rules of professional conduct.

d. Appellant has been prejudiced by the differences between the new rules of professional conduct and the former rules under which appellant was charged. (Question 7).

An analysis of the rules involved in the charges against appellant demonstrates that there has been a substantial

difference from the rules under which appellant was charged and the presently existing rules which became effective on September 1, 1985. For example:

Charge I alleges a violation of DR 2-103 (A) (2). (App. 47-48). This charge militates to appellant's disadvantage because the rules are substantially different. The charge involves soliciting and paying fees for referral of clients; new rule 7.3 (App. 63) adds the motive of the lawyer involved; the old rule restricted to proscribing compensating anyone for recommending or securing a client. These are substantial differences.

Charge I alleges a violation of 3-102 (a). (App. 49) which precludes sharing legal fees with a non-lawyer although "(3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." This has been substantially modified by Rule 5.4 (a) (App. 62-63) which provides that fees paid for soliciting business may now be paid to the non-lawyers as a part of a compensation arrangement.

Charge I and II involves alleged violation of DR 1-102 (a) (6) (App. 46-47) in each of the two charging paragraphs. That DR refers to "* * * any other conduct that adversely reflects on his fitness to practice law." This is not incorporated into or referred to by Rule 8.4. (App. 64). It is, therefore, a non-existent rule in view of the repealing of the old rules of lawyers professional responsibility.

Charge II alleges a violation of 5-101 (a) (App. 49-50) which refers to barring a lawyer from employment "* * * if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own

financial, business, property, or personal interests." See new Rule 1.7 (App. 57-58) which refers to a lawyer not representing a client if the representation of the client will be *"directly adverse"* to another client unless the lawyer believes that the representation will not affect the client and each client consents. The new rule refers to conflicts between clients or with third persons or with the lawyer's own interests. The old rule refers to rejecting a client if the attorney's professional judgment will be affected by financial, business, property, or personal interests.

Charges II and III allege a violation of Rule 5-105, which requires a lawyer to decline a client if it is likely that the judgment apparently on behalf of a present client will be adversely affected or if it would involve representing different interests. This apparently is covered by Rule 1.7, although this new rule requires that the conflicts be "directly adverse." (App. 57).

Count III charges a violation of DR 5-106 (A), which requires that an attorney representing two or more clients in an "aggregate settlement," (the phrase not being defined), must have the consent of each client after having advised the client of among other things "the total amount of the settlement." (App. 51). The new rule. 1.8 does not require total settlement to be disclosed to the client although the existence and nature of the claims and the participation of each person must be disclosed. (App. 58). There is thus an obvious disparity.

Charge II and III allege violations of DR 7-101 (a) which requires that a lawyer not intentionally fail to seek the lawful objectives of the client except as provided in (B), which allows the lawyer to waive client's rights or refuse to participate in unlawful conduct. (App. 51).

New Rule 1.2 (a) provides that "* * * a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." (c) entitles an attorney to discuss legal consequences of the client's conduct. This rule has substantial variance from 7-101.

THE COURT SHOULD ACCEPT JURISDICTION ON THIS INTERMEDIATE APPEAL BECAUSE OF THE OVERWHELMING IMPORTANCE TO THE BAR.

This Court will accept jurisdiction when the Court's criteria are met despite the fact that further proceedings in the lower courts would otherwise occur. The present case involves a reported state decision sustaining the constitutionality of the rules and the constitutionality of the duplicitous charges. The Chief Justice for the Court in *Southland Corp. v. Keating,* —— U.S. ——, 104 S.Ct. 852. 856 (1984) pointed out that this Court would accept intermediate review of a state court decision when thereafter there may be no opportunity to pass on the federal issue would therefore allow to remain in effect the unreviewed decision of a state supreme court on an important issue. The predicate for that decision was *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) which established the four categories for accepting jurisdiction on intermediate review. The court pointed out that in most of the cases accepted for intermediate review the additional state proceedings would not require decision of other federal questions that may require review by the Court later. 420 U.S. at 477. Appellant meets the first category for intermediate review because the federal issues now are conclusive on this matter, because if this Court sustains appellant's contentions, further proceedings would be barred.

The third category is met, because if appellant prevailed before the Board or before the State Supreme Court, there would be left in effect the present state court reported decision and no opportunity to change the state court's decision. 420 U.S. at 481. The fourth ground is met by appellant because the state court has finally determined the federal issues, and appellant may prevail on non-federal grounds and thereby render unnecessary this Court's review of the federal issues. The Court held that "in these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 483.

CONCLUSION

The Court should accept intermediate review by appeal or by certiorari because the state court opinion is not in conformity with the constitutional principles enunciated by this Court. The importance to the 17,000 lawyers practicing in Minnesota is obvious. The state court opinion authorizes duplicitous charges. The discipline rules involved in these charges have been repealed. Somewhat related rules became effective on September 1, 1985 with no saving clause to continue the viability of the earlier discipline rules; and the Court should hold that the new rules cannot be retroactive. This case involves well-established constitutional principles but are in some respects

novel to the procedures involved in disciplining attorneys. The Court should accept jurisdiction.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-497

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In Re Charges of Unprofessional Conduct Against N.P.,
Appellant.

APPENDIX

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APPENDIX

EXHIBIT C

Supreme Court Opinion, January 25, 1985
STATE OF MINNESOTA
IN SUPREME COURT
C4-84-981, C0-84-1223

Supreme Court

Per Curiam
Took no part,
Coyne, J.

In re Charges of Unprofessional
Conduct against N.P.

Endorsed
Filed January 25, 1985
Wayne Tschimperle
Clerk of Appellate Courts

Heard, considered, and decided by the court en banc.

OPINION

PER CURIAM.

This case involves two petitions by attorney N. P. (petitioner) for a writ of prohibition, writ of mandamus, or other relief, one restraining the Director of the Lawyers Professional Responsibility Board (director) from enforcing Rule 25, Rules on Lawyers Professional Responsibility, and ordering him to dismiss or limit his disciplinary investigation of petitioner and the second ordering the director to revise the charges issued against petitioner and

dismiss those based upon DR 1-102, DR 2-203, DR 5-105, and DR 5-106 of the Minnesota Code of Professional Responsibility. These petitions are considered together for purposes of this opinion.

The facts that form the basis of each case are similar and involve legal manuevering of a kind that has resulted in unusually protracted judicial proceedings. In July 1979, the director began a disciplinary investigation of petitioner in response to a letter from a Superior, Wisconsin, physician charging that petitioner's firm has "flagrantly solicited ladies who have had Dalkon shields (sic) inserted for birth control over the past ten years and [has] wrought emotional havoc upon them. [Members of the firm] have flagrantly suggested that they could obtain a cash settlement from Robins Drug Company * * *."[1] This complaint was dismissed on September 28, 1979, with a finding of no unethical conduct. The director subsequently discovered evidence to substantiate the complaint, including evidence that petitioner had allegedly falsified in connection with the original investigation. Accordingly, on May 6, 1980, the director informed petitioner that the matter was to be reopened.

During 1980, 1981, and 1982, successive grand juries conducted detailed investigations of alleged wrongdoings by petitioner, culminating in his February 16, 1982, indictment in federal district court for mail fraud. Shortly thereafter, the director dismissed two additional complaints involving petitioner's activities: on April 6, 1982,

[1]This case does not involve the merits of the celebrated issues concerning the liability of the A. H. Robins Company with respect to the Dalkon Shield intrauterine device but involves, rather, charges of overreaching by an attorney in undertaking to obtain a share of the profits from such litigation.

a complaint alleging that petitioner had refused to turn over the contents of a client file to a successor attorney and on June 3, 1982, a complaint alleging that petitioner had refused to turn over a client file after representation. Both dismissals were limited to the specific complaints and are unrelated to the matter currently at issue.

Following petitioner's indictment, the director stayed investigation of the original complaint, primarily to avoid duplicating the trial court's efforts and to conserve the limited resources of his office. Petitioner was tried before a jury in federal district court and, on November 20, 1982, was acquitted of all charges.

The director then requested access to trial exhibits that he believed would aid his disciplinary investigation, but neither petitioner nor the government would produce them without court order. Consequently, in January 1983, the director filed with the federal district court a motion for release of exhibits, including those presented to the grand jury. Following objections by petitioner, the director amended his motion, withdrawing his request for grand jury exhibits. In his amended motion, the director cited petitioner's failure to voluntarily provide the exhibits pursuant to Rule 25, which requires that an attorney subject to a disciplinary investigation or proceeding cooperate with the director by complying with reasonable requests.

As a result of the director's action, petitioner, on June 13, 1983, moved for an order in Hennepin County District Court declaring Rule 25 unconstitutional and enjoining the director from enforcing it. The district court issued an order to show cause why the requested relief should not be granted. In response, the director petitioned this court for a writ of prohibition, claiming the district court

lacked jurisdiction. On July 12, 1983, we issued a writ directing the district court to suspend or dismiss any further action in *N. P. v. Hoover,* No. C9-83-870 (Minn. July 12, 1983).

On June 20, 1982, while his action was still pending in Hennepin County District Court, petitioner filed a motion in federal district court likewise requesting an order declaring Rule 25 unconstitutional and enjoining its enforcement. The federal court issued an order, filed on September 19, 1983, refusing at that time to rule on the constitutionality of Rule 25 but ordering that the requested exhibits from petitioner's mail fraud trial be turned over to the director, provided the director obtained waivers of confidentiality from individuals whose medical records were included in the exhibits. *Application of the Director of Lawyers Professional Responsibility re: N. P. v. United States of America,* Cr. No. 3-82-32 (D. Minn. Sept. 19, 1983).

After receipt of the trial exhibits, the director continued his investigation and, on May 8, 1984, issued the following charges against petitioner:

Charge [No. 1]

Respondent's solicitation of cases and payment of referral fees violated the disciplinary rules, including but not limited to, DR 2-103(A)(2) and DR 3-102(A), Minnesota Code of Professional Responsibility (MCPR) .Re-Respondent's altering of law firm records to hide the payment of referral fees and respondent's directions to [an associate attorney] were attempts to subvert the disciplinary investigation and violated the disciplinary rules, including but not limited to, DR 1-102(A)(2), Dr 1-102 (A)(4). Dr 1-102(A)(5) and DR 1-102(A)(6), MCPR.

* * * *

Charge [No. 2]

Respondent's payment of monies to [an insurance investigator] while [the investigator] was an Aetna adjuster and negotiating Dalkon Shield claims, undermined [the investigator's] loyalty to Aetna. Respondent's receipt of confidential information from [the investigator] to enhance his clients' cases subverted the adversary system. Respondent created serious conflicts ot interest for [the investigator] and took advantage of them to the detriment of respondent's clients, Aetna, A. H. Robins, and the legal system. Respondent's conduct violated the disciplinary rules, including but not necessarily limited to DR 1-102(A)(2), DR 1-102(A)(5), Dr 1-102(A)(6), DR 5-101, DR 5-105 and Canon 9, MCPR.

* * * *

Respondent's failure to disclose to his clients his employment of [the investigator], breached his fiduciary duty to his clients. His settlement of Dalkon Shield claims with [the investigator], or [the investigator's] co-workers, jeopardized the settlements with Aetna due to [the investigator's] role in their settlement. His conduct violated the disdiplinary rules, including but not limited to DR 1-102(A)(5) ,DR 1-102(A)(6) and DR 7-101(A), MCPR.

* * * *

Charge [No. 3]

Respondent's failure to communicate with his clients and failure to obtain his clients' consents for settlement, some of which were settled in block settlements, violated the disciplinary rules, including but not limited to DR 1-102(A)(6), DR 5-105(B), DR 5-106 and DR 7-101, MCPR.

Charge [No. 4]

Respondent's failure to maintain in the trust account monies equal to the monies to be held in trust and failure to pay clients interest earned on client monies constituted misappropriation of client monies in violation of the disciplinary rules, including but not necessarily limited to DR 9-102(A)(4), MCPR. Respondent's deposit of firm funds in the trust account and his failure to remove law firm monies from the trust account constitutes commingling of client monies with law firm monies and violated the disciplinary rules, including but not necessarily limited to DR 9-102, MCPR. Respondent's failure to maintain proper books and records to determine interest earned on client monies violated the disciplinary rules, including but not necessarily limited to DR 9-102(B)(3) and DR 9-102 (A), MCPR, and Opinion 9 of the Lawyers Professional Responsibility Board.

* * * *

Charge [No. 5]

Respondent's paying insurance adjusters with whom the law firm negotiated cases undermined the adjusters' loyalty to their employers. Respondent created a conflict of interest for the adjusters and took advantage of them to the detriment of respondent's clients, the insurance companies, the insureds and the legal system. Respondent's conduct violated the disciplinary rules, including but not limited to, DR 1-102(A)(2), DR 1-102(A)(4), DR 1-102 (A)(5), DR 1-102(A)(6) and DR 5-101 and Canon 9- MCPR. Respondent's charging of clients for expenses not incurred constituted a conversion of client monies and violated the disciplinary rules, including but not necessarily limited to DR 1-102(A)(4) and DR 9-102(B)(4), MCPR.

Pursuant to his authority under Rule 25, the director requested that petitioner provide certain documents and appear for a deposition on June 14, 1984.[2] Refusing to comply with the director's requests, petitioner, on June 6, filed his first petition with this court, requesting a writ of prohibition, a writ of mandamus, or other relief. Petitioner sought an order staying the scheduled deposition pending determination by the federal district court of the constitutionality of Rule 25 and dismissing charges because the board had unreasonably delayed its investigation or dismissing Charge No. 5 because information supporting it was obtained using a subpoena that violated the confidentiality provisions of Rules 9(d) and 20.

On June 19, 1984, the federal district court issued its determination that it could not rule on the constitutionality of Rule 25, finding that such a determination should be made by this court. This decision has been appealed. *Application of the Director of Lawyers Professional Responsibility Board re: N. P. v. United States of America* Cr. 3-82-32 (D. Minn. June 22, 1984), *appeal docketed*. No. 84-5123 (8th Cir. June 26, 1984). Thereafter, however, petitioner requested that this court determine the constitutionality of Rule 25.[3]

On July 9, 1984, petitioner submitted a second petition for a writ of prohibition, writ of mandamus, or other relief. In this petition, he objected to the charges filed by the director, claiming portions were vague, duplicitous, in-

---

[2]On June 1, 1984, the director served petitioner with a request for admissions pursuant to Rule 9(c). This request was not challenged by petitioner, although compliance with it has been stayed pending this decision.

[3]Petitioner made his request in his reply memorandum in support of his motion to strike Exhibit 1, attached to the director's memorandum in opposition to petitioner's June 6 petition. This court denied petitioner's motion on July 6, 1977.

adequately supported, and based upon unconstitutional disciplinary rules, specifically DR 1-102, DR 2-203, DR 5-105, and DR 5-106.

We deny both of petitioner's requests for extraordinary relief.

1. Initially we note that it is not always clear whether petitioner is seeking a writ of prohibition or a writ of mandamus under each petition, but we find it unnecessary to clarify that in this particular case. Because this action arises from the attorney disciplinary process, this court has original jurisdiction to issue either writ. Although the specific requirements for the writs differ, both require that the director's action or failure to act be improper. *See, e.g.*, Minn. Stat. § 586.01 (1984); R. Civ. App. P. 120; *State ex rel. Anderson v. Bellows*, 287 Minn. 373, 179 N.W.2d 307 (1970); *State ex rel. Ryan v. Cahill*, 253 Minn. 131, 134, 91 N.W.2d 144, 146 (1958). We find no merit in petitioner's claims that the director is acting wrongfully and need not reach the issue whether the other requirements are met.

2 *First Petition*

a. *Claim of undue delay*

Petitioner claims that the director has unreasonably delayed the investigation for 5 1/2 years and that the investigation should therefore be dismissed. We calculate that the actual investigation was commenced 4 years before the charges were filed—a lapse of time still substantially longer than the average attorney disciplinary investigation—dating from the director's May 1980 notification to petitioner that because of new evidence the investigation of the Wis-

consin physician's complaint was being reopened. Our concern, however, is not directed so much at the length of the delay itself but at whether the delay has resulted in prejudice to the attorney being investigated. *In re Williams,* 221 Minn. 554, 564, 23 N.W.2d 4, 9 (1946).

A fundamental goal of every disciplinary action is protection of the public. *See, e.g., In re Hansen,* 318 N.W.2d 856, 858 (Minn. 1982). Requiring prejudice to an attorney before dismissing an action for unreasonable delay is consistent with that goal. Unless the attorney has been unfairly prejudiced, it would not be in the public interest to dismiss a disciplinary proceeding simply because of a failure to prosecute promptly. Among the many cases consistently adhering to that principal are *Ramirez v. State Bar of California,* 28 Cal.3d 402, 619 P.2d 399, 169 Cal. Rptr. 206 (1980). *In re Bossov,* 60 Ill.2d 439, 328 N.E.2d 309, *cert. denied,* 423 U.S. 928 (1975); *Attorney Grievance Comm'n v. Kahn,* 209 Md. 654, 431 A.2d 1336 (1981); *State ex rel. Nebraska State Bar Ass'n v. McArthur,* 212 Neb. 815, 326 N.W.2d 173 (1982); *In re Weinstein,* 254 Or. 392, 459 P.2d 548 (1969), *cert. denied,* 309 U.S. 903 (1970); *In re Wright,* 131 Vt. 473, 310 A.2d 1 (1973).

We find no merit in this argument for dismissal. We add, moreover, that not only has there been no showing of prejudice but that much of the reason for delay is attributable to petitioner's own actions since November 1982 in resisting the director's investigation.

b. *Designating petitioner by name in a subpoena*

Petitioner requests that Charge No. 5 be dismissed because he was designated by name in a subpoena duces

tecum served upon a banking institution to obtain information supporting that charge. Rule 9(d), by express terms, requires that an attorney under investigation be designated only by initials.[4] Furthermore, the confidentiality requirements expressed in Rule 20 apply to all disciplinary investigations.

There is no question that the full name designation of petitioner is a technical violation of Rule 9(d). Nothing in that rule mandates, however, that the sanction for a violation be dismissal of the charges under investigation, and in this case such a sanction would be most inappropriate.

We note at the outset that bank records cannot be obtained without full identification of the bank customer. More importantly, it was not the subpoena that broke the seal of confidentiality, for petitioner himself did so by identifying himself by name in his proceeding in Hennepin County District Court to halt the director's investigation. As we have recognized, rules protecting confidentiality in disciplinary investigations need not be so strictly enforced when the one being investigated has exposed the fact of investigation, such that there is little confidentiality to protect. *See In re Gillard*, 271 N.W 2d 785, 813 (Minn. 1978).

---

[4]Rule 9(d), Rules on Lawyers Professional Responsibility, provides:

> (d) Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by initials in any District Court proceeding.

Petitioner also alleges that naming him in the subpoena violates the general confidentiality principles expressed in Rule 20, which in relevant part states:

> (a) The files, records, and proceedings of the District Committees, the Board, and the Directors, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed * * *.

c. *Constitutionality of Rule 25*

Rule 25, of the Rules on Lawyers Professional Responsibility, establishes an attorney's duty to cooperate with the director during a disciplinary investigation:

> (a) It shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director or his staff, the Board, or a Panel, by complying with reasonable requests, including requests to:
>
> (1) Furnish designated papers, documents or tangible objects;
>
> (2) Furnish in writing a full and complete explanation covering the matter under consideration;
>
> (3) Appear for conferences and hearings at the times and places designated.
>
> (b) Violation of this rule is unprofessional conduct and shall constitute a ground for discipline.

Petitioner challenges this rule on the ground that it is void for vagueness.

The director contends, with merit, that this issue may not appropriately be raised by petitioner since petitioner's failure to cooperate has not been used as a ground for discipline pursuant to Rule 25, so that irreparable harm has neither occurred nor is imminent. We nevertheless address this issue under the principle that it "will settle a rule of practice affecting all litigants," and is a rule of "apparent importance to the litigants and to the bench and bar as a whole." *Leininger v. Swadner*, 279 Minn.

251, 259, 156 N.W.2d 254, 260 (1968) (quoting *Thermorama, Inc. v. Shiller,* 271 Minn. 79, 84 135 N.W.2d 43, 46 (1965)). Because the constitutionality of Rule 25 is certainly important to all litigants and the bench and bar as a whole, we think that if the rule is unconstitutional, extraordinary relief is appropriate.[5]

There is no question that attorneys subject to disciplinary investigations are entitled to due process. *In re Ruffalo,* 390 U.S. 544, 550 (1968). Due process includes adequate notice of the rules with which attorneys are expected to comply. A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement. *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). However, as we held in *Getter v. Travel Lodge,* 260 N.W.2d 177 (Minn. 1977), difficulty in construction is not in itself sufficient to set aside a rule, and the rule "should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislattive intent." *Id.* at 180 (quoting *Anderson v. Burnquist,* 216 Minn. 49, 53, 11 N.W.2d 776, 778 (1943)).

The specific contention of petitioner is that Rule 25 does not define "reasonable requests." Due process, however, does not require that a rule contain an explicit defi-

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[5]Consieration of the issue is not foreclosed even though the decision of the federal district court declining to rule on the issue is currently on appeal to the Eighth Circuit Court of Appeals. As the United States Supreme Court held in *Middlesex Ethics Comm. v. Garden State Bar Ass'n.* 457 U.S. 423 (1982), federal courts must abstain and allow state courts to resolve issues in attorney disciplinary actions where "an adequate state forum for all relevant issues has already been demonstrated to be available prior to any proceedings on the merits in fedeal court." Id. at 437.

nition of every term. *See, e.g., In re Gillard,* 271 N.W.2d 785, 809 (Minn. 1978); *Walker v. Corwin,* 210 Minn. 337, 340, 300 N.W. 800, 801 (1941). All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate. *Ex parte Secombe,* 60 U.S. (19 How.) 9, 14 (1856). Rule 25 gives examples of the types of requests that are considered reasonable, and other Rules on Lawyers Professional Responsibility, specifically Rules 8 (authorizing investigatory subpoenas) and 9 (governing requests for admissions, depositions, and evidence admissible at a panel hearing), contain further examples. Moreover, these rules are applicable to attorneys familiar with the type of cooperation generally expected in adversary matters.

There is merit to petitioner's concern that the rule does not in express terms indicate whether good faith challenges to requests by the director may be deemed a failure to cooperate sufficient to invoke the sanction of the rule. A good faith challenge to a particular request will not be deemed such a failure to cooperate. Moreover, we hold that the Ramsey County District Court, which, under Rule 9(d), has jurisdiction over motions arising from depositions, also has jurisdiction over motions arising from Rule 25 requests. Such a procedure will provide an adequate safeguard against encroachment on constitutionally protected conduct and against other unreasonable requests. As thus modified, we hold that Rule 25 adequately comports with due process.

3. *Second Petition*

a. *Challenges to the director's charges*

Petitioner, asking this court to order the director to strike several statements in the charges and make others more definite, contends that the charges are too vague, contradictory, duplicitous, and inadequately supported.

It is important to note that we are dealing at this stage only with charges and not with a formal petition for discipline. The charges are issued only as part of a preliminary investigation to ascertain if there is probable cause for issuance of a formal petition. *Cf. In re Agerter,* 353 N.W.2d 908, 913 (Minn. 1984) (investigation of judge's misconduct). Petitioner will have adequate opportunity to assert such claims if and when the charges mature into a formal petition.

Given the preliminary nature of the charges issued by the director, we conclude that they need not comply with the stricter standard we would apply to charges in a formal petition but simply must give petitioner a general idea of what actions are being challenged. In considering the specific charges being challenged here, we are also mindful that we are not dealing with "a trap for the unwary" but with charges issued after years of investigation and litigation in related matters. Viewed in light of their informal nature and the extensive background peculiar to this case, we find the charges sufficiently specific to satisfy due process.

b. *Constitutional challenges to disciplinary rules*

DR 1-102(A)(5) and (6)

Subdivisions 5 and 6 of DR 1-102(A) provide:

(A) A lawyer shall not:

* * * *

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Petitioner contends that these subdivisions are unconstitutionally vague.

The United States Supreme Court recognized long ago that "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed." *Ex parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856). We ourselves have, in the comparable situation of applying a legislative standard of judicial conduct, similarly recognized that "necessarily broad standards of professional conduct" are constitutionally permissible. *In re Gillard*, 271 N.W.2d 785, 809 n.7 (Minn. 1978).

Disciplinary Rules 1-102(A)(5) and (6) do no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the court, has a duty to deal fairly with the court and the client. This duty embraces all of the ethical strictures of the code of professional responsibility. Read in conjunction with the other disciplinary rules, we conclude, as have other courts, that these phrases are sufficiently well defined to satisfy due process. *See In re Keiler*, 380 A.2d 119, 126 n.7 (D.C. 1977); *Committee on Professional Ethics & Conduct v. Durham*, 279 N.W.2d 280, 283 (Iowa 1979); *State v. Nelson*, 210 Kan. 637, 639, 504 P.2d 211, 214 (1972);

Louisiana State Bar Ass'n v. Jacques, 260 La. 803, 823, 257 So.2d 413, 420 (1972); *In re Rook*, 276 Or. 695, 705-06, 556 P.2d 1351, 1357 (1976); *Howell v. State*, 559 S.W.2d 432, 436 (Tex. Civ. App. 1977).

DR 2-103

The provisions of DR 2-103(A) deal with solicitation of legal services:

> (A) The following prohibitions shall apply to in-person or telephonic communications, and to employment resulting therefrom, but shall not apply to advertisement, written communications or to employment resulting therefrom, unless the communications contain false, fraudulent, misleading or deceptive statements or claims prohibited under DR 2-101.
>
> (1) A lawyer shall not recommend employment as a private practitioner, of himself or anyone associated with him to a non-lawyer who has not sought his advice regarding employment of a lawyer.
>
> (2) A lawyer shall not compensate or give anything of value to any person to recommend or secure, or as a reward for having recommended or secured employment by a client of himself or any lawyer associated with him, with the exception of public relations or advertising services.
>
> (3) A lawyer shall not request any person to recommend employment, as a private practitioner, of himself or anyone associated with him.

Petitioner's claim, that this detailed rule is vague. is patently without merit. His additional claim that the rule, on its face, violates petitioner's right of free speech is no less without merit in view of the decisions of the United States Supreme Court in *In re Primus,* 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), and our own decision in *In re Discipline of Appert,* 315 N.W.2d 204, 210-15 (Minn. 1981). The basis of these decisions is that because of the potential for abuse, the state has a compelling interest in restricting solicitation of the kind proscribed by this rule. Whether the rule, as applied to petitioner, is unconstitutional is not in issue, for at this stage we do not have before us the evidence upon which the charge is based.

DR 5-105

Under the provisions of DR 5-105(A)-(C):

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Petitioner does not contest the well-settled principle that an attorney, like other fiduciaries, must avoid being placed in a position of conflicting interests. He bases his vagueness claim primarily upon the rule's failure to provide an objective standard for when "the exercise of his independent professional judgment * * * will be or is likely to be adversely affected," *id.*, by multiple representation

The specific situations that would violate this rule as noted with respect to other rules, cannot be cataloged in detail. The words of the rule "will or is likely to be adversely affected" indicate that an attorney sensitive to fiduciary obligations will err, if at all, on the side of rejecting questionable employment.

Therefore the rule is not facially defective. A determination whether, as applied to petitioner, it violates due process must await introduction of evidence.

DR 5-106

Under the provisions of DR 5-106:

> (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the

> settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

Petitioner, noting that the charge refers to the making of "block" settlements rather than "aggregate" settlements, contends that the rule is impermissibly vague. Petitioner does not suggest that there is a difference between the two phrases but suggests only that the director's inconsistency indicates a vagueness in the phrase used in the rule.

Particularly when viewed in the general context in which the rule was invoked, we find it most difficult to see how petitioner was misled or misinformed. In any event, the conplete text of the rule needs no parsing of words and phrases to clearly inform an attorney as to the kind of conduct that is prohibited.[6]

The petitions for extraordinary relief are denied.

COYNE, J., took no part in the consideration or decision of this case.

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[6]Petitioner protests the charge of violating Canon 9, which states, "A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY," on the ground that canons themselves cannot form the basis of a disciplinary action. Whether or not this canon, standing alone. may in any context be a basis for discipline need not be decided now, for it is clear that petitioner is not in this case burdened by the recital of the canon.

EXHIBIT F

THE CHARGES

STATE OF MINNESOTA

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

In Re Charges of Unprofessional Conduct Against N. P.,
Respondent.

DIRECTOR'S CHARGES OF UNPROFESSIONAL CONDUCT, NOTICE OF PREHEARING AND NOTICE OF PANEL ASSIGNMENT

TO THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD:

Respondent is, and has been since December 5, 1949, licensed to practice law in Minnesota. Respondent currently practices law in Minneapolis, Minnesota.

Pursuant to Rule 8 (c) (4) (i), Rules on Lawyers Professional Responsibility (RLPR), the Director of Lawyers Professional Responsibility (Director) submits to a Lawyers Professional Responsibility Board Panel (panel) these charges of unprofessional conduct for its determination of whether probable cause exists to believe public discipline of respondent is warranted.

INTRODUCTION

Identifications.

1. *Willard F. Browne, hereinafter "Browne".*

Until November, 1979, Browne was the primary adjuster for Aetna Life and Casualty Company (Aetna) on Dalkon Shield claims. He handled at least 174 Dalkon Shield claims with respondent. Respondent's law firm paid Browne over $40,000 during the time respondent was negotiating Dalkon Shield cases with Browne.

2. *Margaret Hartman, hereinafter "Hartman".*

Respondent's Dalkon Shield client and a friend of Orvill Heil, respondent's investigator. Respondent paid her for soliciting Dalkon Shield clients in the Duluth-Superior area

3. *Richard Hunegs, Esq., hereinafter "Hunegs".*

A Minnesota lawyer who along with respondent was the majority shareholder and managing partner of DeParcq, Anderson, Perl, Hunegs, and Rudquist, Ltd. (law firm) at all relevant times. The law firm's practice is and has been almost exclusively plaintiff's personal injury.

4. *Norman Perl, Esq., herein "respondent".*

Respondent has been president of the law firm since 1973. He and Hunegs were primarily responsible for all office management decisions, including the handling of client monies and the payment of monies to insurance adjusters and persons soliciting cases for the law firm.

5. *Nancy Pouchnik, hereinafter "Pouchnik".*

A bookkeeper in respondent's law firm from January 24, 1975, through November 21, 1979.

6. *Dalkon Shield.*

An intra-uterine device (IUD) manufactured by A.H. Robins Company from 1971 through 1974. Since 1975, approximately 3,000 claims have been brought against Robins in Minnesota for injuries allegedly resulting from use of the Dalkon Shield.

7. *A.H. Robins Company, hereinafter "Robins".*

Manufacturer of the Dalkon Shield.

8. *Aetna Life and Casualty Company, hereinafter*

Insurer for Robins for Dalkon Shield. Browne's employer.

9. *Investigation Services Inc. fund, hereinafter "ISI".*

Fund maintained by the law firm for paying insurance adjusters with whom the law firm negotiated cases.

10. *Federal Employers Liability Act (FELA) cases.*

Respondent's law firm is the designated counsel for the Brotherhood Railway Carmen of the United States and Canada (Carmen).

1. *RESPONDENT SOLICITED DALKON SHIELD CLIENTS AND ALTERED REFERRAL RECORDS TO SUBVERT THE DISCIPLINARY INVESTIGATION.*

Respondent paid employees a fee for each case referred to the firm. Respondent paid clients and non-employees for soliciting clients. Margaret Hartman was a Dalkon Shield client of respondent. With brochures and retainer agreements for respondent's law firm she solicited over 30 Dalkon Shield clients in the Duluth/Superior area for

respondent. Respondent paid Hartman $1,700 for this solicitation and referral. Bookkeeper Pouchnik recorded the referral fee paid Hartman on the expense sheet for each Dalkon Shield client referred by Hartman.

On March 21, 1979, Robert Sellers, M.D., complained to the Director regarding respondent's solicitation of Dalkon Shield clients in the Superior, Wisconsin, area. After respondent was notified of the complaint, he directed Pouchnik to delete referral payments to Hartman from client expense ledgers and to put them on Hartman's client ledger as loans to Hartman. Hartman did not receive any loans from respondent. *See* Exhibit 1.

After Sellers' complaint, respondent twice directed associate attorney Stephen Eckman to go to the Duluth/Superior area to have each Dalkon Shield client sign a document denying respondent's solicitation. *See* Exhibit 2.

Charge

Respondent's solicitation of cases and payment of referral fees violated the disciplinary rules, including but not limited to, DR 2-103 (A) (2) and DR 3-102 (A), Minnesota Code of Professional Responsibility (MCPR). Respondent's altering of law firm records to hide the payment of referral fees and respondent's directions to Eckman were attempts to subvert the disciplinary investigation and violated the disciplinary rules, including but not limited to, DR 1-102 (A) (2), DR 1-102(A) (4), DR 1-102 (A) (5) and DR 1-102 (A) (6), MCPR.

2. UNDERMINING OF ADVERSARY SYSTEM

A. *Simultaneous Employment of Browne*

Respondent handled 318 Dalkon Shield claims against Aetna, 174 of which were settled for Aetna by Browne.

Until terminated by Aetna on November 15, 1979, Browne was employed full-time as the senior claims representative for Dalkon Shield claims filed with the Minneapolis Aetna office. Browne, a thirty-five year employee of Aetna, handled more Dalkon Shield claims than any other claims representative in the United States. Browne was privy to confidential information and legal opinions regarding the defense of Dalkon Shield cases. Browne attended or received information on national defense strategy meetings. Browne helped set the reserve amount which is the insurer's assessment of the value of the personal injury and determines the settlement limits for the company.

Between 1976 and November 15, 1979, respondent's firm paid Browne the following sums for work Browne allegedly did for respondent's law firm while he was employed simultaneously by Aetna:

1976	$7,505.00
1977	$2,500.00
1978	$11,115.00
1979	$21,496.00

See Exhibit 3.

Respondent directed Pouchnik to spread Browne's payments over the FELA files in alphabetical order in $75, $100 or $125 increments. Pouchnik had no substantiation of Browne's work on any of the files for which she was charging a payment to Browne. *See* Exhibit 4.

While employed by Aetna and respondent, Browne reviewed respondent's Dalkon Shield files. Browne regularly advised respondent as to additional work needed on these files to enhance the value of the claims. *See* Exhibit 5.

Charge

Respondent's payment of monies to Browne while Browne was an Aetna adjuster and negotiating Dalkon Shield claims, undermined Browne's loyalty to Aetna. Respondent's receipt of confidential information from Browne to enhance his clients' cases subverted the adversary system. Respondent created serious conflicts of interest for Browne and took advantage of them to the detriment of respondent's clients, Aetna, A.H. Robins, and the legal system. Respondent's conduct violated the disciplinary rules, including but not necessarily limited to DR 1-102 (A) (2), DR 1-102 (A) (5), DR 1-102 A) (6), DR 5-101, DR 5-105 and Canon 9, MCPR.

B. *Failure to Disclose*

Respondent had a duty to disclose to his Dalkon Shield clients the existence of his non-adversarial relationship with Browne:

> The existence of the "business relationship" created, at the very least, a substantial appearance of impropriety with respect to Perl, and a serious conflict of interest for Browne. A reasonable client would certainly wish to know, and has a right to this information, before proceeding with settlement negotions. If Rice had known, she could have decided to engage another attorney to represent her, or might

> have decided not to go forward at all. The potential risks to her could be serious. If Aetna later rescinded the agreement, Rice's reputation might suffer simply from having been a party, albeit an innocent party, to this arrangement. She was unfairly put in some jeopardy by her fiduciary. An attorney has an obligation to prevent placing his client in a position which might well taint a settlement transaction. The profession's standards of integrity demand no less.

Rice v. Perl, Browne and *Aetna,* 320 N.W.2d 407, 411 (Minn. 1982).

Respondent failed to disclose to his Dalkon Shield clients his relationship with Browne, including that respondent and Browne had a working relationship while Browne was settling Dalkon Shield claims for Aetna.

Charge

Respondent's failure to disclose to his clients his employment of Browne, breached his fiduciary duty to his clients. His settlement of Dalkon Shield claims with Browne, or Browne's co-workers, jeopardized the settlements with Aetna due to Browne's role in their settlement. His conduct violated the disciplinary rules, including but not limited to DR 1-102(A) (5), DR 1-102 (A) (6) and DR 7-101 (A), MCPR.

3. INADEQUATE REPRESENTATION

Most of respondent's 318 Dalkon Shield clients had little or no contact with respondent and knew nothing about the negotiation or settlement of their claims. Many of these clients never consulted with, spoke to, or even

met respondent. Many clients' only contact was to sign a retainer agreement and receive a check. For example, on May 31, 1979, at least 26 clients went to the Duluth Radisson to pick up settlement checks. Some had not even consented to settlement before receiving their checks.

Several claims were settled as part of five block settlements. In four of these respondent and Browne agreed on a single settlement amount for several client claims and respondent had total discretion to distribute the proceeds among the individual clients. The fifth block settlement was between respondent and Aetna adjuster Speltz. Respondent entered into block settlements without the clients' knowledge or consent. See Exhibits 9-13.

Charge

Respondent's failure to communicate with his clients and failure to obtain his clients' consents for settlement, some of which were settled in block settlements, violated the disciplinary rules, including but not limited to DR 1-102 (A) (6), DR 5-105 (B), DR 5-106 and DR 7-101 (A), MCPR.

4. MISAPPROPRIATION, COMMINGLING, AND OTHER TRUST ACCOUNT IMPROPRIETIES

Respondent commingled large amounts of law firm monies with client money in the trust account. The commingled funds were regularly taken out of the trust account, invested and returned to the trust account. Interest earned was retained by the law firm. The law firm did not maintain books and records to identify client monies.

A. *Misappropriation*

The law firm maintained a trust checking account at Marquette National Bank, Account #1004-5144. Respondent directed the management of monies held in the trust account. In fiscal years 1979 and 1980 the average month end balance in the account was $162,000. Monies in the account sometimes were as high as $5,000,000.

Respondent failed to maintain client monies in the client trust account. The amount in the trust account on a daily or month-end basis was less than the amount of client monies to be held in trust. Although the bank covered shortages, the account sometimes on a daily or month-end basis was overdrawn. In November, 1979, the account was overdrawn $147,295 at the end of the month.

Respondent invested monies from the trust checking account in high return short-term investments. These investments were made frequently, sometimes eight or ten times in a month. The amount of money invested in each transaction was often several hundred thousand dollars to a million dollars. Respondent did not obtain client consent for investment of trust monies, identify interest accruing to clients or pay the interest to the clients. Respondent directed that the law firm misappropriate to its own benefit all interest earned on trust checking monies invested. *See* Exhibit 14.

B. *Commingling*

Hundreds of thousands of dollars of law firm money from the general account regularly were deposited in the client trust checking account with client monies. Respondend regularly left law firm monies in the trust account after distribution of settlement proceeds. Respondent reg-

ularly moved firm and client funds from the trust checking account to the trust savings account, general account, or into investments. *See* Exhibit 7.

C. *Books and Records*

Respondent failed to maintain client subsidiary ledgers or other books and records which would identify client monies held in trust. Respondent maintained a monthly due client list which allegedly identified client monies held in trust. However, the amount due a client often included the law firm's fees earned but not withdrawn. Therefore, the due client list did not identify client monies held in trust. Respondent failed to reconcile the client cash balance in the account. Because respondent failed to maintain the proper books and records the law firm was unable to determine client monies held in trust, invested or interest earned on client monies.

Charge

Respondent's failure to maintain in the trust account monies equal to the monies to be held in trust and failure to pay clients interest earned on client monies constituted misappropriation of client monies in violation of the disciplinary rules, including but not necessarily limited to DR 9-102 (A) (4), MCPR. Respondent's deposit of firm funds in the trust account and his failure to remove law firm monies from the trust account constitutes commingling of client monies with law firm monies and violated the disciplinary rules, including but not necessarily limited to DR 9-102, MCPR. Respondent's failure to maintain proper books and records to determine interest earned on client monies violated the disciplinary rules, including

but not necessarily limited to DR 9-102 (B) (3) and DR 9-102 (A), MCPR, and Opinion 9 of the Lawyers Professional Responsibility Board.

5. ISI ACCOUNT—LAW FIRM ACCOUNT USED FOR PAYMENT TO INSURANCE ADJUSTERS

In 1971, respondent's law firm incorporated Investigation Services Inc. (ISI). An ISI checking account has been maintained at Marquette National Bank since 1971, account number 10059772.

The ISI account was funded by client monies. When files were closed, Pouchnik prepared closing statements for review by respondent or Hunegs. For personal injury cases in which the client paid expenses, respondent and/or Hunegs added on an arbitrary ISI expense ranging from $10 to $2,300. *See* Exhibit 4.

At settlement, monies for client expenses, including ISI, were deposited in the general account. The ISI expenses were segregated and deposited monthly in the ISI account. Average monthly ISI deposits were $800 to $3,000.

The ISI monies purportedly were segregated to pay costs of investigation from a separate account. However, all costs of investigation other than some photographs were paid out of the general account. Further, the ISI payments were not directly related to any expense for the client's case.

Respondent directed payment of ISI monies to pay insurance adjusters with whom the law firm negotiated cases. Respondent paid Browne on one occasion with a check drawn on the ISI account. The adjusters did not submit any time records or statements to substantiate the payments.

Charge

Respondent's paying insurance adjusters with whom the law firm negotiated cases undermined the adjusters' loyalty to their employers. Respondent created a conflict of interest for the adjusters and took advantage of them to the detriment of respondent's clients, the insurance companies, the insureds and the legal system. Respondent's conduct violated the disciplinary rules, including but not limited to, DR 1-102(A) (2), DR 1-102 (A) (4), DR 1-102(A) (5) DR 1-102 (A) (6) and DR 5-101 and Canon 9, MCPR. Respondent's charging of clients for expenses not incurred constituted a conversion of client monies and violated the disciplinary rules, including but not necessarily limited to DR 1-102 (A) (4) and DR 9-102(B) (4), MCPR.

WHEREFORE, the Director prays that the panel find probable cause to believe public discipline is warranted and instruct the Director to file a petition for public discipline.

Dated: May 8, 1984.

/s/ Michael J. Hoover
MICHAEL J. HOOVER
DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY
444 Lafayette Road - 4th floor
St. Paul, MN 55101
(612) 296-3952
and
/s/ Janet Dolan
JANET DOLAN
ASSISTANT DIRECTOR

NOTICE OF PRE-HEARING MEETING

A pre-hearing meeting concerning the above Director's Charges of Unprofessional Conduct will be scheduled for a future date in the Director's office, 444 Lafayette Road, Fourth Floor, St. Paul, Minnesota 55101.

You and your counsel, if any, must attend the meeting. The purposes of the meeting are to obtain a response to each allegation in the charges, to exchange witness lists, to mark and exchange exhibits, and to plan the efficient use of the panel's time. *See* Rule 9 (e), RLPR.

Please bring the original and one copy of each exhibit you will offer at the hearing.

Failure to attend the meeting may be a separate ground for disciplinary action. *See* Rule 25, RLPR.

If you cannot attend the meeting as scheduled, immediately notify the undersigned.

NOTICE OF PANEL ASSIGNMENT

The above Director's Charges of Unprofessional Conduct have been assigned to a panel. The name, address, and telephone number of the Panel chairman and vice-chairman are:

Chairman
Mr. Ronald P. Smith
313 Degree of Honor Building
St. Paul, MN 55101
(612) 227-6301

Vice-Chairman
Mr. George O. Ludcke
2318 Parkwoods Road
St. Louis Park, MN 55416
(612) 922-7592

MICHAEL J. HOOVER
DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY
By /s/ Janet Dolan
Janet Dolan
Attorney
444 Lafayette Road - 4th floor
St. Paul, MN 55101
(612) 296-3952

EXHIBIT A

Order denying Petition for Rehearing
July 17, 1985

OFFICE OF THE CLERK OF THE APPELLATE COURTS

STATE CAPITOL, ST. PAUL

C4-84-981
C0-84-1223

Date: July 17, 1985

In Re Charges of Unprofessional Conduct against N.P.

Please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, *that the petition for reargument herein be and the same hereby is denied and stay vacated.*

IT IS FURTHER ORDERED, that respondent, Director of Lawyers Professional Responsibility is awarded attorney fees in the amount of $250.00 pursuant to Minn. R. Civ. App. 140.03.

Respectfully,

Wayne Tschimperle
Clerk of the Appellate Courts

STATE OF MINNESOTA
IN SUPREME COURT
C4-84-981, C0-84-1223

In Re Charges of Unprofessional
Conduct against N.P.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

TO: Director, Minnesota Lawyers Professional Responsibility Board, 444 Lafayette Road, 4th Floor, St. Paul, MN 55101 and
The Honorable Hubert H. Humphrey, III, State Attorney General, 102 State Capitol, St. Paul, MN 55155

NOTICE IS HEREBY GIVEN that N.P., Petitioner in the above-entitled matters, hereby appeals to the Supreme Court of the United States from the Order dismissing N.P.'s petitions entered in this action on January 25, 1985 and the Order denying Petitioner's Petition for Re-Hearing, entered on July 17, 1985.

This appeal is taken pursuant to Title 28, United States Code, Section 1257.

Dated: August 1, 1985.

By: /s/ PATRICK J. FOLEY
FRANCES S. P. LI
608-2nd Avenue South, Suite 565
Minneapolis, MN 55402
(612) 339-4511
and
RONALD MESHBESHER
JACK NORDBY
1616 Park Avenue
Minneapolis, MN 55404
(612) 339-9121
Attorneys for Appellant

EXHIBIT B

March 8, 1985 Order denying the Stay
STATE OF MINNESOTA
IN SUPREME COURT
C4-84-981

In Re Charges of Unprofessional
Conduct against N.P.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the application of N.P. for a stay of all proceedings now pending before the Lawyers Professional Responsibility Board until such time as a petition for rehearing filed in this court has been decided and thereafter until disposition of a timely petition, if any, for a writ of certiorari to the United States Su-

preme Court is granted only for the period necessary for the disposition of the petition for rehearing by this court. Thereafter, any application for a further stay shall be directed to the United States Supreme Court.

Dated: March 8, 1985.

BY THE COURT:

_____

Chief Justice

EXHIBIT D

Minnesota Rules on Lawyers Professional Responsibility

(Excerpts)

RULE 2. PURPOSE

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these rules.

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

(a) Composition. The Board shall consist of:

(1) A Chairman appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chairman; and

(2) (a) Twelve lawyers having their principal offices in this state, six of whom the Minnesota State Bar Associa-

tion may nominate, and nine nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which he was originally appointed and any period served as Chairman.

(b) Compensation. The Chairman, other Board members, and other panel members shall serve without compensation, but shall be paid their reasonable and necessary expenses incurred in the performance of their duties.

(c) Duties. The Board shall have general supervisory authority over the administration of these Rules, shall advise and assist the Director in the performance of his duties, and may, from time to time, issue opinions on questions of professional conduct. The Board may elect a Vice-chairman and specify his duties, and may elect an Executive Committee and authorize it to perform specified duties of the Board between Board meetings.

(d) Panels. The Chairman shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a nonlawyer, and shall designate a Chairman and a Vice-Chairman for each Panel The Board's Chairman or the Vice-Chairman is a Panel member at any Panel proceeding he attends. Three Panel members, at least one of whom is a lawyer, shall constitute a quorum. The Board's Chairman or the Vice-Chairman may designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, pro-

vided, that any panel with other than current Board members must include at least one current lawyer Board member. A panel may refer any matters before it to the full Board.

(e) Assignment to Panels. The Director shall assign matters to Panels in rotation.

(f) Approval of petitions. Except as provided in these Rules or ordered by this Court, no petition for disciplinary action shall be filed with this Court without the approval of a Panel or the Board.

RULE 9. PANEL PROCEEDINGS

(a) Charges; setting pre-hearing meeting If the matter is to be submitted to a Panel, the Director shall prepare charges of unprofessional conduct, assign them to a Panel by rotation, schedule a pre-hearing meeting, and notify the lawyer of:

(1) The charges;

(2) The name, address, and telephone number of the Panel chairman and vice-chairman;

(3) The time and place of the pre-hearing meeting; and

(4) The lawyer's obligation to appear at the time set unless the meeting is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

(b) Admission of charges. The lawyer may, if he desires:

(1) Admit some or all charges; or

(2) Tender an admission of some or all charges conditioned upon a stated disposition.

If a lawyer makes such an admission or tender, the Director may proceed under Rule 10(b).

(c) Request for admission. Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing meeting or within ten days thereafter. The Rules of Procedure for the District Courts applicable to requests for admissions, govern except that the time for answers or objections is ten days and the panel chairman or vice-chairman shall rule upon any selections. If a party fails to admit, the Panel may award expenses as permitted by the Rules of Civil Procedure for the District Courts.

(d) Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for District Courts. A deposition under this Rule shall be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by panels in any District Court proceeding.

(e) Pre-hearing meeting. The Director and the lawyer shall attend a pre-hearing meeting. At the meeting:

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing;

(2) Each party shall mark and provide the other party a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each

exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission; and

(3) The parties shall prepare a pre-hearing statement.

(f) Setting Panel hearing. Promptly after the pre-hearing meeting, the Director shall schedule a hearing by the Panel on the charges and notify the lawyer of:

(1) The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman. The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, of the pre-hearing statement, and, unless the parties agree or the Panel chairman or vice-chairman orders o the contrary, of all documentary exhibts marked orders to the contrary, of all documentary exhibits marked at the pre-hearing meeting.

(g) Form of evidence at Panel hearing. The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for testimony by:

(1) The lawyer;

(2) A complainant who affirmatively desires to attend; and

(3) A witness whose testimony the Panel chairman or vice-chairman authorized for good cause.

If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by initials in any district court proceeding.

(h) Procedure at Panel hearing. Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

(1) The Chairman shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on any charge, and that the Panel will terminate the hearing whenever it is satisfied that there is or is not such probable cause (or, if the Director has issued an admonition under Rule 8(c)(2), that the hearing's purpose is to determine whether the Panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court);

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which he proposes to offer thereon;

(3) The lawyer may respond to the Director's remarks;

(4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

(5) The parties may present oral arguments; and

(6) The Panel shall either recess to deliberate or take the matter under advisement.

(i) Disposition. After the hearing, the Panel shall either:

(1) Determine that there is not probable cause to believe that public discipline is warranted (or, if the Director has issued an admonition under Rule 8(c)(2), affirm or reverse the admonition), or

(2) If it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel shall not make a recommendation as to the matter's ultimate disposition.

(j) Notification. The Director shall notify the lawyer the complainant, if any, and the District Committee, if any that has the complaint, of the Panel's disposition. If the Panel did not determine that there was probable cause to believe that public discipline is warranted, the notification to the complainant, if any, shall inform him

of his right to petition for review under subdivision (k). If the Panel affirmed the Director's admonition, the notification to the lawyer shall inform him of his right to appeal to the Supreme Court under subdivision (*l*).

(k) Complainant's petition for review. If the complainant is not satisfied with the Panel's disposition, he may within 14 days file with the clerk of the Supreme Court a petition for review. The clerk shall notify the respondent and the Board Chairman of the petition The respondent shall be denominated by initials in the proceeding This Court will grant the review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action, or take any other action as the interest of justice may require.

(l) Respondent's appeal to Supreme Court. The lawyer may appeal the Panel's affirmance of the Director's admonition by filing a notice of appeal and nine copies thereof with the Clerk of Appellate Courts and by serving a copy on the Director within 30 days after being notified of the Panel's action. This Court may review the matter on the record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may either affirm the admonition or make such other disposition as it deems appropriate.

(m) Manner of recording. Proceedings at a Panel

hearing or deposition may be recorded by sound recording or audio-video recording if the notification thereof so specifies. A party may nevertheless arrange for stenographic recording at his own expense.

(n) Panel chairman authority. Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel chairman or vice-chairman. For good cause shown, the Panel chairman or vice-chairman may shorten or enlarge time periods for discovery under this Rule.

RULE 20. CONFIDENTIALITY: EXPUNCTION

(a) General rule. The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

(1) As between the Committees, Board, and Director in furtherance of their duties;

(2) In proceedings before a referee or this Court under these Rules;

(3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;

(4) Upon request of the lawyer affected;

(5) Where permitted by this Court; or

(6) Where required or permitted by these Rules.

(b) Special matters. The following may be disclosed by the Director:

(1) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(2) The fact that the Director has either determined that discipline is not warranted, or issued an admonition;

(3) The Panel's disposition under these Rules;

(4) The fact that stipulated probation has been approved under Rule 8(c) (3).

(c) Referee or Court proceedings. Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential. * * *

RULE 25. REQUIRED COOPERATION

(a) Lawyer's duty. It shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director or his staff, the Board, or a Panel, by complying with reasonable requests, including requests to:

(1) Furnish designated papers, documents or tangible objects;

(2) Furnish in writing a full and complete explanation covering the matter under consideration;

(3) Appear for conferences and hearings at the times and places designated.

(b) Grounds of discipline. Violation of this rule is unprofessional conduct and shall constitute a ground for discipline.

EXHIBIT E

MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another

(3) Engage in illegal conduct involving moral turpitude

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 2-103. Recommendation of Professional Employment: Suggestion of Need of Legal Services.

(A) The following prohibitions shall apply to in-person or telephonic communications, and to employment resulting therefrom, but shall not apply to advertisement, written communications or to employment resulting therefrom, unless the communications contain false, fraudu-

lent, misleading or deceptive statements or claims prohibited under DR 2-101.

(1) A lawyer shall not recommend employment as a private practitioner, or himself or anyone associated with him to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(2) A lawyer shall not compensate or give anything of value to any person to recommend or secure, or as a reward for having recommended or secured employment by a client of himself or any lawyer associated with him, with the exception of public relations or advertising services.

(3) A lawyer shall not request any person to recommend employment, as a private practitioner, of himself or anyone associated with him.

(4) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

(5) A lawyer shall not accept employment if he knows or it is obvious that it results from unsolicited advice by him or any lawyer associated with him to a layman that he should obtain counsel or take legal action, except:

(a) If the advice was to a close friend, relative, former client (if the advice is germane to the former employment), or one reasonably believed to be a client.

(b) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics.

(c) If success in asserting rights or defense of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek employment from those contacted for the purpose of obtaining their joinder.
(Amended, effective September 29, 1975; amended. effective May 29, 1980).

DR 3-102. Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate or the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client

will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment

if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

* * *

DR 5-106. Settling Similar Claims of Clients

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 7-101. Representing a Client Zealously

(A) A lawyer shall not intentionally

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by

being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

9-102. Preserving Identify of Funds and Property of a Client

(A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable interest bearing trust accounts as set forth in DR 9-103. No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein.

(2 Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(Amended effective July 1, 1983).

EXHIBIT G

MINNESOTA RULES OF PROFESSIONAL CONDUCT
Effective September 1, 1985

RULES OF PROFESSIONAL CONDUCT
STATE OF MINNESOTA
IN SUPREME COURT
C8-84-1650

ORDER PROMULGATING MINNESOTA RULES OF PROFESSIONAL CONDUCT

WHEREAS, The American Bar Association has adopted Model Rules of Professional Responsibility; and

WHEREAS, the Minnesota Ad Hoc Committee on the American Bar Association Model Rules of Professional Conduct, a committee of the Minnesota State Bar Association, has proposed the adoption of the ABA Model Rules, with certain amendments; and

WHEREAS, the Rules as modified by the Ad Hoc Committee have been discussed at a convention of the Minnesota State Bar Association on June 30, 1984; and

WHEREAS, the House of Delegates and General Assembly of the Minnesota State Bar Association has directed the officers of the association to petition the Minnesota Supreme Court to adopt the ABA Model Rules as amended; and

WHEREAS, the Minnesota Supreme Court has held a hearing on the proposed rules on January 4, 1985, and being fully advised in the premises,

NOW. THEREFORE, IT IS HEREBY ORDERED that the attached Minnesota Rules of Profesional Conduct are adopted as the standard of professional responsibility for lawyers admitted to practice in Minnesota, effective September 1, 1985, and

IT IS FURTHER ORDERED that the existing Minnesota Code of Professional Responsibility as adopted by the Minnesota Supreme Court on August 4, 1970, is hereby repealed, effective August 31, 1985.

Dated: June 3, 1985.

BY THE COURT

/s/ Douglas K. Amdahl
Chief Justice Minnesota Supreme Court

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c) and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of the matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequence of any proposed course of conduct with a client

and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. * * *

RULE 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed, Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in

Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the rpresentation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8 Conflict of Interest: Prohibited Transactions

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client consents after consultation, including disclosure of the existence and nature of all the claims and of the participation of each person in the settlement.

RULE 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests were materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter represent-

ing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

RULE 1.15 Safekeeping Property

(a) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (c) through (f). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein.

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the pawyer and render appropriate accounts to the client regarding them.

(4) promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(c) Each trust account referred to in paragraph (a) shall be an interest bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence.

(d) A lawyer who receives client funds shall maintain a pooled interest bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any transaction costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.

(e) All client funds shall be deposited in the account specified in paragraph (d) unless they are deposited in:

(1) a separate interest bearing trust account for the particular client or client's matter on which the interest, net of any transaction costs, will be paid to the client; or

(2) a pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any transaction costs, to the client.

(f) In determining whether to use the account specified in paragraph (d) or an account specified in paragraph (e), a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of financial institutions described in paragraph (c) to calculate and pay interest to individual clients.

(g) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a currect basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with para-

graphs (a) through (e). The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients, for at least six years after completion of the employment to which they relate.

(h) Every lawyer subject to paragraph (g) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court may prescribe, that the lawyer or the lawyer's law firm maintains books and records as required by paragraph (g).

RULE 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement

plan, even though the plan is based in whole or in part on a profit-sharing arrangement

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interestt therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 7.3 Direct Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

EXHIBIT 2

STATE OF MINNESOTA

ss.

COUNTY OF HENNEPIN

AFFIDAVIT OF STEPHEN S. ECKMAN

STEPHEN S. ECKMAN, being first duly sworn on oath, says:

1. Affiant is a licensed attorney in Minnesota, practicing in Minneapolis at 501 Butler Square, with the firm of ECKMAN, STRANDNESS & EGAN, P.A.;

2. Affiant was an employee of the DeParcq, Anderson, Perl & Hunegs (Respondents) Law Firm from August 1, 1972 through April 6, 1979, as an attorney;

3. While with Respondent's law firm, Affiant handled plaintiff personal injury cases and Federal Employer Liability Act cases (FELA files);

4 During affiant's employment with the Respondent's law firm, Respondent was a managing partner with Richard G. Hunegs, each owning fifty percent of the law firm;

5. Affiant was introduced to Willard F. Browne as a claims adjuster for Aetna Casualty Insurance Company (Aetna);

6 Affiant was aware that Respondent's law firm opposed Aetna in various legal matters in addition to the Dalkon Shield claims;

7. Affiant was not aware Browne had been hired by Respondent's law firm for any kind of work on any files, FELA, or otherwise;

8 Affiant became aware that Browne was granted access to Respondent's law firm offices on occasion, including a portion of the law firm in which client Dalkon Shield files were stored;

9. Affiant observed no work by Browne on any FELA files, nor did he observe Browne working on any FELA files in the offices of Respondent's law firm;

10. Your affiant, in reviewing numerous FELA files over the term of his employment with the law firm, observed no work product of any kind produced by Browne, or any references to Browne, in any FELA file;

11. Affiant was present in office meetings when Respondent and Hunegs instructed office attorneys to handle cases with Aetna, Browne's employer, differently than other insurance companies. Cases with Aetna were not to be placed in suit, but were to be given to Respondent for negotiation with Browne;

12 Affiant attended a general office staff meeting of attorneys and investigators in which Respondent instructed various attorneys in the room to prepare several Aetna cases for settlement discussions with Browne, who was to be in the office the following week. Respondent also said Browne was in Las Vegas, Nevada, on that date, and commented, "I don't know what that is costing me;"

13 Your Affiant did not work on Dalkon Shield claims in the law firm, but did see Browne in the law offices on many occasions with firm Dalkon Shield files in his possession, in the company of Respondent;

14. In early March 1979, Affiant was summoned to a meeting in Respondent's office. Respondent told those in attendance (Hunegs, Donald Rudquist, Orville Heil, and your Affiant) that he had just learned of a Complaint lodged against Respondent's law firm by a doctor in Superior, Wisconsin. At that meeting, Respondent directed Affiant to go to the Duluth/Superior area and meet with Respondent's Dalkon Shield clients in the Radisson Hotel. Affiant was instructed by Respondent to have each of the clients sign a document confirming that Respondent and his agents had not solicited the client's case, but that the clients had sought Respondent's advice and representation on the Dalkon Shield cases. Affiant refused to do this;

15 A second meeting was held at Respondent's law offices sometime later regarding the same subject matter as the above meeting. Affiant was also present at this meeting. Respondent again directed Affiant to go to the Duluth/Superior area, talk to the Dalkon Shield clients and have them sign the letter above discussed, but your Affiant refused again to participate in this activity. At that time, Respondent, Hunegs, Rudquist, and your Affiant dictated a strong letter to the doctor (and another doctor making a complaint from West Duluth) to hopefully dissuade the doctor from his complaint.

16 Further your Affiant states and verily believes that this final meeting was held on April 6, 1979, Affiant's last working day at Respondent's law firm;

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Stephen S. Eckman

Subscribed and sworn to before me this 6 day of Feb. 1984.

/s/ Helen C. Carcicfini
NOTARY PUBLIC

EXHIBIT 5

STATE OF MINNESOTA

ss.

COUNTY OF HENNEPIN

AFFIDAVIT OF JOHN MICHAEL EGAN

I, JOHN MICHAEL EGAN, being first duly sworn on oath, says:

1. Affiant is a licensed attorney in Minnesota.

2. Affiant was employed as an attorney with DeParcq, Anderson, Perl & Hunegs (respondent's) law firm from January 1976, until April 8, 1979.

3. While with respondent's law firm, Affiant handled personal injury and probate matters.

4. During Affiant's employment with respondent's law firm respondent was a managing partner.

5. Affiant knew Willard F. Browne (Browne) to be a claims adjuster for Aetna Casualty and Surety Insurance Company (Aetna).

6. Affiant verily believes that within the period of January 1976 to April 1979, that Browne had not been hired by respondent's law firm to work on Federal Employee Liability Act (FELA) cases nor on any other kind of cases

7. Affiant frequently saw Browne in respondent's law offices on a weekly or more than weekly basis. Affiant saw Browne at respondent's law office's social functions.

8. At an office meeting for all lawyers and investigators in respondent's law office in early 1978, Affiant heard respondent to say Will says Aetna is paying on these (Dalkon Shield) claims and they should go out and sign up some of these cases.

9. During an office meeting at respondent's law office in the spring of 1978, Affiant heard respondent say Will says other lawyers are getting fifty percent on these (Dalkon Shield) cases and that respondent's office should do so too. Affiant did not agree to do this.

10. Browne never attended any of the regularly scheduled office meetings at respondent's law firm from January 1976 to April 1979.

11. At a 1978 Christmas party at which respondent, Browne, investigators for respondent's law firm and other employees were present, Affiant heard respondent say to Olson, an investigator, don't worry about Will, we're taking care of him.

12. Affiant handled approximately seventeen Dalkon Shield cases for respondent's law firm. Respondent did all the settlement negotiations on Affiant's files. Affiant was not present at the settlement negotiations.

13. Dalkon Shield cases were handled differently than other personal injury cases in respondent's law office. Other claims were handled with a view towards going to trial. Dalkon Shield cases were handled with a view toward settlement.

14. Late in November 1978, Affiant observed Browne going through a stack of ten to fifteen Dalkon Shield files in respondent's offices. Four of these files were being handled by Affiant. Affiant had not given Browne permission to review these files. These four files were settled between respondent and Browne as part of a group on January 31, 1979.

15 On several occasions, Respondent told Affiant that Browne said a case (Dalkon Shield) could settle for X dollars if respondent could get certain specific medical or biographical information into the file.

16. Affiant brought the Mary A. Pitman Dalkon Shield claim into respondent's law firm on a referral from

another attorney. The issue of causation between the use of the Dalkon Shield and the alleged injury in the Pitman case was defensible as indicated in the medical record. In March of 1979, respondent told Affiant he had met with Browne regarding the Pitman case. Respondent said the case could be settled for $8,000 but thought he could get $10,000 to $14,000. Respondent further said Browne told him if a doctor's opinion could be obtained stating the Dalkon Shield was related to the injury they could get $18,000 to $20,000. On April 8, 1979, Affiant started his own practice and had physical possession of the Pitman file. On April 30, 1979, respondent sent a letter to Pitman, carbon copying Affiant. Affiant had not given respondent permission to negotiate for his client Pitman. The April 30 letter stated respondent had been offered $24,000 on the Pitman claim. Affiant then spoke to Ms. Pitman after receiving a copy of this letter and set up a meeting with respondent, Ms. Pitman and himself. This meeting was held May 2, 1979, at respondent's office. Respondent told Pitman that Aetna made an offer of $20,000 to $22,000 but he thought he could get as much as $24,000. The date of the settlement check to Pitman is May 8, 1979, for $24,000. There were no expenses on the settlement sheet for any further medical opinions or medical evaluations done on the Pitman case prior to negotiation and settlement. Affiant advised his client, Pitman, that it was in her best interest to accept the substantial settlement offer, which she did.

17. Affiant was aware that respondent's law firm paid referral fees to non-lawyer employees for bringing in cases to the firm.

18. Affiant was aware that respondent's law firm opposed Aetna in other matters in addition to the Dalkon Shield claims.

19. Affiant was never informed by respondent that Browne was available as an expert consultant for medical evaluations.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ John Michael Egan

Subscribed and sworn to before me this 8 day of Feb. 1984.

/s/ Helen C. Carciofini
Notary Public

(3)

No. 85-497

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

IN RE CHARGES OF UNPROFESSIONAL CONDUCT AGAINST N.P.,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEES MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD AND DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court erred in holding that appellant's disciplinary proceeding will not be dismissed for a delay in the investigation when there has been no showing of prejudice to appellant resulting from the delay, and whether the decision rests on adequate and independent state grounds?

2. Whether the language of the Minnesota Supreme Court's opinion, which attributed to appellant responsibility for some of the delay in the disciplinary proceeding, was a penalty depriving him of a right to seek a redress of grievances in the courts in violation of the first amendment to the United States Constitution?

3. Whether the charges of unethical conduct filed against appellant are sufficiently specific to comply with due process standards by informing a panel of the Board of Professional Responsibility of the alleged unethical conduct so it can properly determine probable cause and by giving appellant fair notice so that he may prepare his defense?

4. Whether the Minnesota Supreme Court erred in sustaining the facial validity of Disciplinary Rules 1-102(A)(5) and (6), 2-103, 5-105, and 5-106, of the Minnesota Code of Professional Responsibility?

5. Whether this court may review appellant's questions 5 and 6 regarding the effect of the repeal of the Minnesota Code of Professional Responsibility and the adoption of the Rules of Professional Responsibility when those questions were not presented to the Minnesota Supreme Court?

PARTIES TO THIS PROCEEDING

Appellant: N.P. is an attorney licensed to practice law in the State of Minnesota and was denominated Respondent in the proceeding below.

Appellees: The Minnesota Lawyers Professional Responsibility Board is a board established by the Minnesota Supreme Court and given general supervisory authority over the conduct of attorney disciplinary proceedings; the Director of Lawyers Professional Responsibility administers the Rules of Lawyers Professional Responsibility by investigating complaints of attorney misconduct or disability and by initiating disciplinary actions where warranted.

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-497

IN RE CHARGES OF UNPROFESSIONAL CONDUCT AGAINST N.P.,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEES MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD AND DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY

Appellees Minnesota Board of Professional Responsibility and Director of Lawyers Professional Responsibility, pursuant to Rule 16 of the Supreme Court of the United States, move to dismiss the appeal herein on the grounds that the questions presented are so insubstantial as not to need further argument, the decision of the Minnesota Supreme Court rested on adequate and independent state grounds, or the questions have not been finally determined by the highest court of the State of Minnesota.

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CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions and the applicable provisions of the Minnesota Code of Professional Responsibility and of the Rules of Professional Responsibility are set forth by appellant (Jur. Stat. 3-4; A-47 to A-55).[1]

The applicable portions of the Minnesota Rules on Lawyers Professional Responsibility are Rule 2, Rule 7, Rule 8, Rule 9, Rule 13(a), and Rule 14. (State A-1 to State A-10).[2]

STATEMENT OF THE CASE

This is an appeal from the decision of the Minnesota Supreme Court denying appellant's petitions to that court for writs of prohibition, mandamus, or other extraordinary relief. Appellant is an attorney licensed to practice in the State of Minnesota. He is currently the subject of charges of unethical conduct issued by the director of the Minnesota Lawyers Professional Responsibility Board.[3]

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[1] Throughout this motion, the abbreviation "Jur. Stat." means appellant's Jurisdictional Statement; the abbreviation "A-" is a reference to the Appendix to the Jurisdictional Statement.

[2] Throughout this motion, the abbreviation "State A-" is a reference to the Appendix to the Motion to Dismiss of Appellees Minnesota Board of Professional Responsibility and Director of Lawyers Professional Responsibility.

[3] The conduct of lawyer disciplinary proceedings is governed by the rules of Lawyers Professional Responsibility. The full course of a disciplinary proceeding involving charges of serious misconduct has four stages. First, either the director or a local bar association ethics committee investigates the allegations contained in a complaint. Rules 7 and 8 (State A-1). Second, if the director concludes, on the basis of the results of the investigation, that public discipline is warranted, the director submits the results of the investigation to a three-member panel of the Board of Professional Responsibil-

The charges were drawn up by the director at the close of his investigation in May of 1984. The charges were served on appellant and submitted to a panel of the Board for a probable cause determination. The probable cause hearing was never held because appellant filed his petitions with the Minnesota Supreme Court challenging several procedural rules of the disciplinary process, the facial validity of the substantive rules governing attorney conduct which appellant was charged with violating, and the sufficiency of the charges brought by the director.

Appellant contended that the investigation should be dismissed because the director had unreasonably delayed the investigation of appellant for five and one-half years. *In re Charges of Unethical Conduct Against N.P.*, 361 N.W.2d 386, 392 (Minn. 1985) (hereinafter "N.P.") (A-8). While the Minnesota Supreme Court acknowledged that the actual investigation was commenced four years before the charges were filed, the court was not concerned solely with the length of delay. The court considered whether the delay had resulted in prejudice to appellant. The court properly determined that there had been no showing of prejudice to appellant noting that much of the reason for delay was attributable to appellant's own actions in resisting the director's investigation. *N.P.*, 361 N.W.2d at 393 (A-8 to A-9).

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ity. The panel determines whether probable cause exists to believe that public discipline is warranted. If the panel so determines, the panel instructs the director to file a petition for disciplinary action in the supreme court. Rules 8(c)(4)(i) and 9 (State A-2). Third, upon the director's filing his petition, the supreme court appoints a referee who conducts a trial-like hearing and submits findings, conclusions, and recommendations to the court. Rule 14 (State A-9). Fourth, the court rehears the matter on the record, briefs, and argument and makes a final disposition. Rule 14(e) (State A-10).

Appellant also challenged the charges filed against him as vague, contradictory, duplicitous and inadequately supported. The Minnesota Supreme Court noted that the charges were issued only as part of a preliminary investigation to ascertain probable cause for issuance of a formal petition and that appellant would have ample opportunity to assert his claims regarding the specificity of the charges if the charges mature into a formal hearing. The court then determined that the charges are sufficiently specific to satisfy due process in view of their informal nature and the extensive background peculiar to this case.[4] *Id.* at 395 (A-14).

The Minnesota Supreme Court also rejected appellant's constitutional challenges to the facial validity of the disciplinary rules under which he was charged. The court determined that Disciplinary Rule 1-102(A)(5) and (6), which proscribes conduct prejudicial to the administration of justice and conduct that adversely reflects on a lawyer's fitness to practice law, is sufficiently well defined to satisfy due process when read in conjunction with the other disciplinary rules. *Id.* at 395 (A-15). Disciplinary Rule 2-103, which proscribes in-person and telephonic solicitation of clients and the payment of referral fees, was determined by the court to be neither facially vague nor violative of the first amendment. The court noted that whether the rule was unconstitutional as applied to appellant was not yet at issue. *Id.* at 396 (A-17). Similarly, the court determined that Disciplinary Rule 5-105A, which sets forth the contours of employment involving conflicts of interest, is not facially defective, and that whether it violates

---

[4] The factual and procedural background of appellant's disciplinary proceeding involves numerous collateral actions and events that span a period of nearly six years. The opinion of the Minnesota Supreme Court contains a summary of the background. *N.P.*, 361 N.W.2d at 389-392. (A-1 to A-8).

due process as applied to appellant must await introduction of evidence. *Id.* at 396 (A-18). Finally, the Minnesota Supreme Court determined that the director's use of the term "block settlements" in his charges did not mislead appellant and that Disciplinary Rule 5-106, which proscribes aggregate settlements without full disclosure to each client, clearly informs an attorney as to the kind of conduct prohibited. *Id.* at 396 (A-19).

Subsequent to the court's decision on January 25, 1985, denying appellant's petitions, but while appellant's petition for a rehearing was pending, the court by order dated June 3, 1985, repealed the then existing Minnesota Code of Professional Responsibility effective August 31, 1985, and adopted the Minnesota Rules of Professional Conduct effective September 1, 1985. Appellant raises for the first time in this Court two questions concerning the effect of the court's order on his disciplinary proceeding.

Appellees submit this motion to dismiss on the grounds that appellant has failed to raise a substantial federal question warranting further review by this Court and has raised questions not properly before this Court on appeal.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S DECISION, THAT APPELLANT'S DISCIPLINARY PROCEEDING WILL NOT BE DISMISSED FOR DELAY IN THE INVESTIGATION WHEN THERE HAS BEEN NO SHOWING OF PREJUDICE TO APPELLANT FROM THE DELAY, IS PLAINLY CORRECT AND RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Appellant argues that the Minnesota Supreme Court should have dismissed the director's investigation because the director had unreasonably delayed the investigation. The court correctly found no merit to appellant's argument. The court held that appellant had not shown that he had been unfairly prejudiced by the delay. The court's decision rests not on federal principles of due process, but on the equity principle of laches. Moreover, appellant offers no authority for his contention herein that the delay violated due process. Thus, this Court has no jurisdiction under 28 U.S.C. § 1257 to review the Minnesota Supreme Court's determination of the question of delay.

This Court has no jurisdiction to review a state court decision if the judgment below is supported by an adequate state ground. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566 (1977). In the present case the Minnesota Supreme Court's decision concerning the issue of undue delay rested on the state equity principle of laches. In the Minnesota courts, the doctrine of laches depends upon a determination in each case as to whether there has been so unreasonable a delay in asserting a known right, resulting in prejudice to others, that it would be inequitable to grant the relief prayed for. *Klapmeier v. Town of Center of Crow Wing County*, 346 N.W.2d 133, 137 (Minn. 1984).

Thus, when the Court held that unless an attorney has been unfairly prejudiced, it would not be in the public interest to dismiss a disciplinary proceeding simply because of failure to prosecute promptly, the Court was relying on the doctrine of laches. Moreover, the cases cited by the court, its own as well as those from other jurisdictions, rely upon the equity principle of laches rather than upon due process doctrine.[5] *N.P.*, 361 N.W.2d at 393 (A-9).

Conspicuously absent from appellant's jurisdictional statement is any authority for his contention that the director's delay violated due process. Appellant cites *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) and *United States v. Shaughnessey*, 347 U.S. 260, 265 (1954), for the undisputed proposition that agencies must follow their own rules. Yet he provides no authority defining when a delay constitutes a deprivation of due process.

Appellant appears to argue that the Minnesota Supreme Court erred by failing to cite Rule 2 of the Rules of Lawyers Professional Responsibility which provides in part that allegations of unprofessional conduct be investigated promptly. (State A-1). Appellant asserts that such failure is itself a violation of appellant's due process rights. (Jur. Stat. 9). Appellant misstates the court's opinion. As discussed above, the court considered whether the lapse of time had unfairly prejudiced appellant, and found that appellant had not shown prejudice. The court did not fail to apply Rule 2 to the director's investigation; it simply found against appellant.

Thus, appellant fails to raise a federal question to invoke this Court's jurisdiction under 28 U.S.C. § 1257. His appeal should therefore be dismissed.

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[5] In one of the cited cases, *Ramirez v. State Bar of California*, the opinion does use the phrase "due process" in a three sentence disposition of the laches issue there, 619 P.2d 399, 405 (1980); however, the decision there could properly rest on equity principles only.

II. THE LANGUAGE IN THE OPINION OF THE MINNESOTA SUPREME COURT, WHICH ATTRIBUTED TO APPELLANT SOME RESPONSIBILITY FOR THE DELAY IN HIS DISCIPLINARY PROCEEDING, IS PLAINLY NOT A PENALTY, AND APPELLANT'S ARGUMENT TO THE CONTRARY FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends herein that the very language of the Minnesota Supreme Court's opinion which states, "We add, moreover, that not only has there been no showing of prejudice but that much of the reason for delay is attributable to petitioner's own actions since November 1982 in resisting the director's investigation," is itself a violation of due process. (Jur. Stat. 8 to 10). Appellant appears to premise this meritless contention on the theory that the court's language constitutes a penalty imposed on appellant because he resisted the director's attempts to obtain documentary evidence in the possession of the United States Attorney in 1982 and successfully obtained delays in the disciplinary proceedings while his petitions to the court were pending in 1984. Appellant argues that the alleged penalty is impermissible under *Spevack v. Klein*, 385 U.S. 511 (1967), and *Blackledge v. Perry*, 417 U.S. 21 (1974). Appellant's reliance on *Spevack* and *Blackledge* is totally misplaced.

As discussed above, laches is a doctrine of equitable relief. A party seeking equitable relief cannot at the same time insist that the court disregard any fact in his own conduct which makes the sought after relief inequitable. *Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953).

The first complaint of improper conduct against appellant reached the director's office in July of 1979. After a prompt investigation by the director, the complaint was dismissed in

September, 1979, with a finding of no unethical conduct. The director subsequently reopened the investigation in June of 1980, when he discovered evidence that appeared not only to substantiate the complaint, but also to indicate that appellant had falsified evidence in connection with the original investigation. *N.P.*, 361 N.W. at 390 (A-2).

The director properly stayed his investigation during 1980, 1981 and 1982, while appellant was the subject of grand jury investigations and a federal criminal trial. After appellant was acquitted of all criminal charges on November 20, 1982, the director requested access to trial exhibits that he believed would aid his investigation. Appellant resisted the director's request in both federal and state district courts. The exhibits were not finally ordered to be turned over to the director until September, 1983. The director then resumed his investigation and, at its close, filed charges against appellant on May 8, 1984. *Id.* at 390-391 (A-2 to A-4).

The court properly viewed appellant's resistance to the director's request for federal trial exhibits for over eleven months as one factor in balancing the equities on the laches issue. Finding that appellant's conduct had contributed to some of the delay, the court correctly denied appellant's request to dismiss the investigation.

Appellant also cannot, in view of the opinion below, maintain that the Minnesota Supreme Court has penalized him for challenging the director's investigation through his petitions to that court. In a part of the court's opinion not at issue here, the court carefully determined that good faith challenges to the director's investigative requests will not result in discipline. The court further provided a process to safeguard attorneys subject to investigation from requests which encroach on constitutionally protected conduct and from other unreasonable requests. *N.P.*, 361 N.W.2d 394-395 (A-13).

Thus, appellant's characterization of the court's language as a penalty equivalent to the loss of a significant property right suffered by Spevack as a result of his asserting fifth amendment rights, *Spevak*, 385 U.S. at 516, or the loss of liberty suffered by Perry as a result of his invocation of a statutory right of appeal, *Blackledge*, 417 U.S. at 28, is patently untenable. In sum, appellant's argument, besides evidencing a convoluted logic, fails to raise any issue of sufficient constitutional dimension or merit to warrant consideration by this Court. His appeal should therefore be dismissed.

III. THE CHARGES OF UNETHICAL CONDUCT FILED AGAINST APPELLANT ARE SUFFICIENTLY SPECIFIC TO COMPLY WITH DUE PROCESS STANDARDS, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant contended below that the charges submitted by the director for a determination of probable cause are vague, contradictory, duplicitous, and inadequately supported. Appellant argues herein that in finding the charges sufficiently specific, the court erred in failing to apply the same standard of specificity to the charges of unethical conduct as it would to a formal petition and that the court's alleged error deprived him of due process. (Jur. Stat. 10-11).

The court was entirely correct in rejecting appellant's contentions. Noting that it was dealing only with preliminary charges issued at the probable cause stage of the proceeding and not with a formal petition for discipline, the court correctly found the charges sufficiently specific to satisfy due process, given their informal nature and the extensive background peculiar to this case. *N.P.*, 361 N.W.2d at 395 (A-14).

As the following will demonstrate, the charges, as formulated by the director, fully comport with due process standards by not only giving appellant fair notice of the conduct alleged in support of the charges but also informing the probable cause panel of the facts alleged so that it may decide whether they are sufficient under the disciplinary code to support a finding of probable cause. The appeal of this issue thus presents no substantial federal question that warrants further review.

A. The Charges Are Sufficiently Specific To Give Appellant Fair Notice Of The Conduct Charged As Unethical So That He May Prepare His Response.

In disciplinary proceedings, attorneys are entitled to procedural due process, which includes fair notice of the charges before the proceeding commences. *In re Ruffalo,* 390 U.S. 544, 550-551 (1968). In *Ruffalo,* the petitioner there had no notice that certain conduct would be considered a disbarment offense until after he had presented evidence on all the material facts pertaining to that conduct. Thus he was trapped into giving evidence before he had an opportunity to know the precise charge on which he was ultimately disbarred. *Id.* at 551.

The charges against appellant herein contain no such infirmity. The charges, as framed by the director, communicate appellant's wrongful conduct with sufficient clarity that he is given fair notice of the alleged unethical conduct in order to prepare a response.

The charges are set forth in a 12-page "Director's Charges of Unprofessional Conduct, Notice of Prehearing and Notice of Panel Assignment" with some 14 attached exhibits. (A-20 to A-33, and A-64 to A-71). The document contains an introductory section which identifies persons referred to in the charges and defines pertinent terms. Each of the five suc-

ceeding charges is introduced by a heading (e.g., "Respondent Solicited Dalkon Shield Clients and Altered Referral Records to Subvert the Disciplinary Investigation"). The charges are also preceded by a succinct narrative summarizing the factual basis supporting the charge and referencing supporting exhibits. The charges themselves are set forth as one or more discrete statements of the wrongful conduct with references to the pertinent disciplinary rules.

Appellant creatively, but entirely without merit, attempts to suggest that since he is able to find some comfort, with whatever warrant, in some of the exhibits attached to the Director's charges that he is therefore being "entrapped," as was the case in *Ruffalo*. (A-11 to A-12). There is no attempt here to get appellant to posit a defense to any of the charges against him on any basis that would constitute a further basis for discipline. Nor do any of appellant's readings of the exhibits attached to the charges in any way support such a contention.

Appellant appears to urge this Court to apply the principles enunciated in *Zauderer v. Office of Disciplinary Counsel*, —— U.S. ——, 105 S.Ct. 2265, 2283 (1985), to his allegations regarding the specificity of the charges. (Jur. Stat. 14). Whatever appellant's representations of *Zauderer* may be, the Court's decision there fully supports the decision below. Attorney Zauderer was disciplined in part for an advertisement soliciting defense of drunk driving cases. The advertisement stated that clients' full legal fees would be refunded if they were convicted of drunk driving. A complaint filed by the Ohio Office of Disciplinary Counsel alleged that the advertisement was deceptive on the theory that it offered representation on a contingent fee basis, which could not be carried out under the disciplinary rules. However, the disciplinary panel

of the Ohio Board of Commissioners used a basis different from the Office of Disciplinary Counsel for disciplining the attorney. The panel found that the advertisement might be deceptive on the theory that it failed to mention the common practice of plea bargaining and potential clients would be unaware of the likelihood that they would both be found guilty of a lesser offense and be liable for attorney fees because they had not been convicted of drunken driving. The Supreme Court of Ohio, in turn, adopted the panel's findings. The attorney contended before this Court that the discrepancy in the theory asserted by the Office of Disciplinary Counsel and the theory relied upon by the Ohio Supreme Court and its Board of Commissioners violated due process. However, this Court held that the discrepancy did not violate the constitutional guarantee of due process. In Part VI of its Opinion, the Court stated:

> That the Board of Bar Commissioners chose to make its recommendation of discipline on the basis of reasoning different from that of the Office of Disciplinary Counsel is of little moment: what is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio.

Zauderer, 105 S.Ct. at 2284.

The Court's reasoning holds true with even greater force in this case. Here, the charges have a lengthy history, are fully detailed, and the proceedings are at a much earlier stage.

Finally, appellant erroneously argues that the Rules of Lawyers Professional Responsibility fail to provide for dismissing multiple, duplicitous, contradictory, or unconstitutional allegations, exhibits, and charges. (Jur. Stat. 13). The rules, in fact, provide ample opportunity to challenge the

specificity and sufficiency of both the charges filed to ascertain probable cause and later charges filed in a formal petition for disciplinary action. Rule 9(e)(1) and (2) provides for a pre-hearing before the panel hearing in which the director and appellant may formulate stipulations of facts, narrow and simplify issues, and admit or object to exhibits. (State A-6). Rule 9(m) gives the panel chair authority over requests or disputes arising under Rule 9. (State A-9).

Should the panel find probable cause and instruct the director to file a petition for disciplinary action in the Supreme Court, appellant will have an even broader opportunity to raise constitutional challenges to the charges in the petition. Rule 13(a) allows appellant to raise any defense, privilege, or matter in mitigation in his answer to the director's petition. (State A-9). In the subsequent hearing before a referee under Rule 14(b) and the following hearing before the Supreme Court under Rule 14(e), appellant can assert whatever claims concerning the specificity of the charges the petition may warrant.[6] (State A-10).

The foregoing amply demonstrates that the Minnesota Supreme Court was entirely correct when it concluded, "[appellant] will have adequate opportunity to assert such claims if and when the charges mature into a formal petition." *N.P.*, 361 N.W.2d at 395. (A-14).

Thus, the Minnesota Supreme Court's determination that the charges are sufficiently specific to comply with due process is entirely correct. Appellant raises no substantial federal question that warrants further review by this Court.

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[6] Hearings before a referee are conducted according to the rules of civil procedure applicable to state district courts, which provide appellant with the opportunity to test the petition's charges through motions on the pleadings and motions for summary judgment.

B. The Charges Are Sufficiently Specific To Inform A Panel Of The Board Of The Conduct Alleged As Unethical So That It May Determine Probable Cause.

In the context of a pleading in a criminal proceeding, this Court has held that the purpose of specificity in an indictment is in part to inform the court of the facts alleged, so that the court may decide whether they are sufficient in law to support a conviction. *U.S. v. Cruikshank*, 92 U.S. 542, 558 (1876). Applying the principles of *Cruikshank* to the decision below, as appellant urges, it is clear that the director's charges are sufficiently specific in view of the procedural posture at issue.[7]

The procedural posture below is a probable cause determination by a panel of the Board. The panel must decide, after hearing, whether there is probable cause to believe that public discipline is warranted. Rule 9(i), Rules of Lawyers Professional Responsibility (State A-8). When the principles enunciated in *Cruikshank* are applied to a probable cause determination under Rule 9(i), *a fortiori* the charges submitted for the probable cause determination must be sufficiently specific to inform the probable cause panel of the conduct alleged in sufficient detail to enable the panel to decide whether the conduct supports a finding that public discipline is warranted under the Code of Professional Conduct.

The charges against appellant, as the following summary demonstrates, communicate appellant's alleged wrongful conduct with sufficient clarity so that the probable cause panel may make their determination. Appellant solicited cases and

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[7] Appellee does not argue that the due process requirements of a criminal proceeding are applicable in full to an administrative proceeding, but rather that the principles enunciated long ago in *Cruikshank* are helpful in determining the appropriate standards herein.

paid referral fees, altered law firm records to hide the payment of the referral fees, and directed an associated attorney to subvert a disciplinary investigation. Appellant paid monies to an insurance investigator while the investigator was an adjuster negotiating Dalkon Shield claims with appellant, thus undermining the investigator's loyalty to his employer. Appellant received confidential information from the investigator to enhance his client's case, subverting the adversary system. Appellant created serious conflicts of interest for the investigator and took advantage of him to the detriment of his clients, the insurance company, the defendant manufacturer, and the legal system. Appellant failed to disclose to his clients his employment of the investigator, breaching his fiduciary duty to his clients. His settlement of Dalkon Shield claims with the investigator or the investigator's co-workers jeopardized the settlements due to the investigator's role in the settlement. Appellant failed to maintain in the trust account monies equal to the monies to be held in trust, and failed to pay clients interest earned on client money. Appellant deposited firm funds in the trust account and failed to remove law firm monies from the trust account, thereby commingling client monies with law firm monies. Appellant failed to maintain proper books and records to determine interest earned on client money. Appellant paid insurance adjusters with whom the law firm negotiated cases, thereby undermining the adjusters' loyalty to their employers. Appellant created a conflict of interest for the adjusters and took advantage of them, to the detriment of appellant's clients, the insurance companies, the insured, and the legal system. Appellant charged clients for expenses not incurred, constituting a conversion of client monies. *N.P.*, 361 N.W.2d at 391-392. (A-4 to A-6).

The conduct alleged in the charges is thus clearly specified, so the panel may determine whether the conduct is sufficient under the Code of Professional Responsibility to support a finding of probable cause.

In conclusion, the Minnesota Supreme Court correctly determined that the charges served upon appellant are sufficiently specific to comply with due process. The charges sufficiently inform a panel of the Board of the alleged unethical conduct charged so that the panel can make a probable cause determination. The charges also give appellant fair notice of the charges so that he may prepare his defense. Finally, the procedural rules governing attorney disciplinary actions provide appellant with ample opportunity to challenge the director's charges should they mature into a formal petition.

Thus, appellant fails to raise a substantial federal question warranting review by this Court. Appellant's appeal should, therefore, be dismissed.

IV. THE DECISION OF THE MINNESOTA SUPREME COURT, DETERMINING THAT DISCIPLINARY RULES 1-102(A)(5) AND (6), 2-103, 5-105 AND 5-106 ARE FACIALLY VALID, IS PLAINLY CORRECT, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant argues that Disciplinary Rules 1-102(A)(5) and (6), 2-103, 5-105 and 5-106 are facially vague in that they impose incomprehensible standards of conduct on lawyers. (Jur. Stat. 16). When appellant's vagueness challenge is analyzed in light of decisions in this Court, it is apparent that

he presents no substantial federal question that warrants further review.[8]

This court has long recognized that "it is difficult, if not impossible, to enumerate and define with legal precision, every offense for which an attorney or counselor ought to be removed". *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856). Yet essential due process guarantees apply fully to attorney disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 550 (1968). The due process standards applicable to rules governing attorney conduct have been most recently summarized by Justice Brennan in his partial dissent and partial concurrence in *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2289-2290, (n.8 omitted):[9]

> A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

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[8] Appellant raises a question concerning Disciplinary Rule 2-103, which proscribes in person and telephonic solicitation of clients (Jur. Stat. iii); however, appellant did not present argument on this question.

[9] Justice Brennan's partial concurrence and partial dissent was not based upon the majority's use of a vagueness standard different than that asserted by Justice Brennan. Rather, in the context of the vagueness standard applicable to regulations involving attorney commercial speech, J. Brennan would have held that Ohio's rule did not contain properly specific prophylactic measures regarding cost disclaimers in advertisements involving contingent fees. *Id.* at 2291.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). This requirement "applies with particular force in review of laws dealing with speech," *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," *Smith v. California*, 361 U.S. 147, 151 (1959).

. . .

Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." [In re *Ruffalo*, 390 U.S.] at 555 (WHITE, J., concurring in result)*

*Arguably vague regulations may take on "definiteness and clarity" in the context of the profession's "complex code of behavior," and an attorney is properly charged with knowledge of all applicable disciplinary rules and ethical guidelines. *In re Bithoney*, 486 F.2d 319, 324-325 (CA1 1973). See also Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N.C.L. Rev. 671, 676-680 (1979).

In that portion of *Ruffalo* cited by Justice Brennan, Justice White considered whether it was proper to disbar Ruffalo under a general standard of the Court of Appeals for the Sixth Circuit. The standard included "conduct unbecoming a member of the bar of the court." *Ruffalo*, 390 U.S. at 555. Justice White reasoned that even when a disbarment standard is as unspecific as that of the Sixth Circuit, members of a bar

can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment, including conduct which all responsible attorneys would recognize as improper for a member of the profession. *Id.* at 555.

As the following demonstrates, the disciplinary rules challenged by appellant clearly put responsible attorneys on notice of the conduct prohibited so that they may act accordingly.

A. The Court Was Correct In Holding That The Standards Of Conduct Contained In Disciplinary Rule 1-102(A)(5) And (6) Are Sufficiently Defined When The Rule Is Read In Conjunction With The Other Disciplinary Rules.

Disciplinary Rule 1-102(A)(5) and (6) provides:

> (A) A lawyer shall not
>
> . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Appellant contends that Disciplinary Rule 1-102(A)(5) and (6) imposes incomprehensible standards on attorney conduct. (Jur. Stat. 16). The Minnesota Supreme Court's construction of the standards contained in Disciplinary Rule 1-102(A)(5) and (6), which incorporates into the rule all of the ethical strictures of the Code of Professional Responsibility, cures any arguably impermissible vagueness on the face of the rule.

In the construction of standards of judicial conduct, the Minnesota Supreme Court has recognized that necessarily broad standards of professional conduct incorporate specific rules contained in the Code of Professional Responsibility and

the Code of Judicial Conduct. *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978).

In the present case, the court properly concluded that the standards set forth in Disciplinary Rules 1-102(A)(5) and (6) "do no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the court, has a duty to deal fairly with the court and the client." The court then defined an attorney's duty as that which embraces all of the ethical strictures of the Code of Professional Responsibility. "Read in conjunction with the other disciplinary rules," the court concluded, "these phrases are sufficiently well defined to satisfy due process." *N.P.*, 361 N.W.2d at 396 (A-15).

The court's construction of the standards in Disciplinary Rule 1-105(A)(5) and (6) thus gives the definiteness and clarity to their application to attorney conduct. The scope of "conduct prejudicial to the administration of justice" and "conduct that adversely reflects on his fitness to practice law," is limited to conduct prohibited by all of the ethical strictures of the Code. Responsible attorneys need not guess at the meaning of Disciplinary Rule 1-105(A)(5) and (6).

B. Disciplinary Rule 2-103 Is A Permissible Prophylactic Measure Restricting In-Person And Telephonic Solicitation Of Clients, And Its Detailed Provisions Comport With Due Process Standards.

The provisions of Disciplinary Rule 2-103(A) are as follows:

> (A) The following prohibitions shall apply to in-person or telephonic communications, and to employment resulting therefrom, but shall not apply to advertisement, written communications or to employment resulting therefrom, unless the communications contain false, fraudu-

lent, misleading or deceptive statements, or claims prohibited under DR 2-101.

(1) A lawyer shall not recommend employment as a private practitioner, of himself or anyone associated with him to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(2) A lawyer shall not compensate or give anything of value to any person to recommend or secure, or as a reward for having recommended or secured employment by client of himself or any lawyer associated with him, with the exception of public relations or advertising services.

(3) A lawyer shall not request any person to recommend employment, as a private practitioner, of himself or anyone associated with him.

In the proceeding below, appellant claimed that Disciplinary Rule 2-103(A) is vague and violates his right of free speech. As the Minnesota Supreme Court noted, appellant's claim that such a detailed rule is vague is "patently without merit." The court also properly rejected appellant's argument that the rule violated his right of free speech. *N.P.*, 361 N.W.2d at 397 (A-17).

In rejecting appellant's first amendment challenge, the court relied on decisions of this Court in *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978), and on its own decision in *In re Discipline of Appert*, 315 N.W.2d 204, 210-15 (Minn. 1981). This Court's decision in *Ohralik*, makes clear that states may employ prophylactic measures to avert the inherent dangers of overreaching and other misconduct inherent in in-person solicitation of clients. *Ohralik*, 436 U.S. at 464.

Disciplinary Rule 2-103(A) is limited on its face to in-person and telephonic solicitation. Its use is thus entirely permissible as a prophylactic measure to serve the state's compelling interest in restricting solicitation of the kind proscribed by the rule. *See N.P.*, 361 N.W.2d at 396 (A-17).

Appellant's vagueness challenge to Disciplinary Rule 2-103 (A) was also properly rejected. Due process requires that rules give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, so that he may act accordingly. *Grayned*, 408 U.S. 104, 108 (1972). The detailed provisions of Disciplinary Rule 2-103(A) are so clear and definite in their descriptions of prohibited conduct that the court was entirely correct in rejecting appellant's vagueness challenge as patently meritless.

C. The Standard Of Conduct Mandated By Disciplinary Rule 5-105(A) To (C) Is Reasonably Ascertainable To Members Of The Legal Profession.

Disciplinary Rule 5-105(A) to (C) provides:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Appellant premises his vagueness challenge to Disciplinary Rule 5-105 on a contention that the rule fails to provide an objective standard for when "the exercise of his independent professional judgment . . . will be or is likely to be affected," by multiple representation. The Minnesota Supreme Court's determination, that the words "will or is likely to be adversely affected" indicate that an attorney sensitive to fiduciary obligations will err, if at all, on the side of rejecting questionable employment, provides a reasonably ascertainable standard of conduct. *N.P.*, 361 N.W.2d at 396 (A-18), (Jur. Stat. 16).

Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of facts in the case at hand. *U.S. v. Powell,* 423 U.S. 87, 92 (1975). Under the principles enunciated in *Powell,* it is clear that a statute which gives adequate warning of prohibited conduct will be sustained even though doubts as to the applicability of the statute's language in marginal fact situations may be conceived. When a party whose conduct is regulated by the statute has been given clear notice that a reasonably ascertainable standard of conduct is mandated, it is for him to insure that his actions do not fall outside legal limits. *Id.* at 92-93.

While the decision in *Powell* concerned a vagueness challenge to a criminal statute, this appeal presents a rule setting forth

the ethical contours of attorney employment involving conflicts of interest. As the Minnesota Supreme Court noted, the specific situations that would violate the rule cannot be catalogued in detail. *N.P.*, 361 N.W.2d at 396 (A-18). The rule does, however, encompass a reasonably ascertainable standard of conduct, an attorney's fiduciary obligations to his client. It goes without saying that an attorney's professional training and the traditions of the legal profession enable him to insure that his conduct does not violate his fiduciary duty to his clients. The court was thus entirely correct in rejecting appellant's challenge to the rule on its face. Whether the rule, as applied to appellant, violates due process, must await introduction of evidence.

D. The Complete Text Of Disciplinary Rule 5-106 Clearly Informs Attorneys Of The Kind Of Conduct Prohibited.

Disciplinary Rule 5-106 provides as follows:

> (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

Appellant contends that the above rule is impermissibly vague because the term "aggregate settlement" is not defined. Such contention is without merit.

As discussed above, a statute does not violate due process if it gives a person of ordinary intelligence reasonable notice of the conduct prohibited. *Grayned*, 408 U.S. at 108.

In the proceeding below, appellant argued that the director used the phrase "block settlement" in the charge that appellant violated Disciplinary Rule 5-106 rather than the phrase "aggregate settlement" which is contained in the rule. Appellant did not suggest that there was a difference between the two phrases, but only that the director's inconsistency indicates a vagueness in the rule. *N.P.*, 361 N.W.2d at 397 (A-18 to A-19). Appellant cannot therefore argue that the rule does not give men of ordinary intelligence notice of the conduct prohibited by the rule. Thus the Minnesota Supreme Court was entirely correct in summarily rejecting appellant's vagueness claim:

> [P]articularly when viewed in the general context in which the rule was invoked, we find it most difficult to see how appellant was misled or misinformed. In any event, the complete text of the rule needs no parsing of words and phrases to clearly inform an attorney as to the kind of conduct that is prohibited."

N.P., 361 N.W.2d at 397. (A-19).

In summary, the Minnesota Supreme Court's decision upholding the facial validity of the challenged disciplinary rules comports with its own precedents as well as with those in this Court. Accordingly, there is no need for this Court to review that decision to vindicate federal rights.

V. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW APPELLANT'S QUESTIONS 5 AND 6 REGARDING THE REPEAL OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE ENACTMENT OF THE RULES OF PROFESSIONAL RESPONSIBILITY BECAUSE THOSE QUESTIONS WERE NOT PRESENTED TO THE MINNESOTA SUPREME COURT.

By order dated June 13, 1985, the Minnesota Supreme Court adopted a new standard of lawyer professional responsibility, the Minnesota Rules of Professional Conduct. The new rules became effective September 1, 1985, and replaced the previous Code of Professional Responsibility. (A-54 to A-55). Appellant raises for the first time herein questions regarding the effect of the court's order on his disciplinary proceeding. Since these questions were not raised in the Minnesota Supreme Court, this Court does not have jurisdiction to review them on appeal.

It is axiomatic that before this Court has jurisdiction to review a claim of federal right, the claim "must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. . . ." *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1919).

Appellant misinforms this Court when he states, "Appellant sought and obtained review in the State Supreme Court on original petitions on each of the issues presented in this appeal." (Jur. Stat. 6). Appellant did not raise these issues before the Minnesota Supreme Court and it is patent from the court's opinion that it did not consider them. Therefore, since this Court lacks jurisdiction under 28 U.S.C. § 1257 to review these questions, appellant's appeal should be dismissed.

CONCLUSION

For the foregoing reasons, the appellees respectfully submit that this appeal presents no substantial question for the decision of this Court, questions which the Minnesota Supreme Court decided on adequate and independent state grounds, and questions which were not presented to the court below. The appeal should therefore be dismissed.

Dated: October 14, 1985

Respectfully submitted,

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APPENDIX

Relevant excerpts from the Rules of Lawyers Professional Responsibility, adopted November 1, 1976, effective January 1, 1977, with amendments received through July 15, 1984.

Rule 2. Purpose

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.
(Amended July 22, 1982.)

Rule 7. District Committee Investigation

(a) Assignment; Assistance. The District Chairman may investigate or assign investigation of the complaint to one or more of the Committee's members, and may request the Director's assistance in making the investigation. The investigation may be conducted by means of written and telephonic communication and personal interviews.

(b) Report. The District Chairman or his designee shall report the results of the investigation to the Director. The report shall include a recommendation that the Director:

(1) Determine that discipline is not warranted;

(2) Issue an admonition;

(3) Refer the matter to a Panel; or

(4) Investigate the matter further.

(c) Time. The investigation shall be completed and the report made promptly and, in any event, within 45 days after the District Committee received the complaint, unless good

cause exists. If the report is not made within 45 days, the District Chairman or his designee within that time shall notify the Director of the reasons for the delay.

(d) Removal. The Director may at any time and for any reason remove a complaint from a District Committee's consideration by notifying the District Chairman of the removal.

(e) Notice to Complainant. The Director shall keep the complainant advised of the progress of the proceedings.

Rule 8. Director's Investigation.

(a) Initiating Investigation. At any time, with or without a complaint or a District Committee's report, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers.

(b) Investigatory subpoena. With the Board Chairman or Vice-Chairman's approval upon the Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

(c) Disposition.

(1) *Determination Discipline not Warranted.* If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted he shall so notify the lawyer involved, the complainant, and the Chairman of the District Committee, if any, that has considered the complaint. The notification:

(i) May set forth an explanation of the Director's conclusion;

(ii) Shall set forth the complainant's identity and the complaint's substance; and

(iii) Shall inform the complainant of his right to appeal under subdivision (d).

(2) *Admonition.* In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, he may issue an admonition. The Director shall notify the lawyer in writing:

(i) Of the admonition;

(ii) That the admonition is in lieu of the Director's presenting charges of unprofessional conduct to a Panel;

(iii) That the lawyer may, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

(iv) That unless the lawyer so demands the Director after that time will notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, that the Director has issued the admonition.

If the lawyer makes no demand under clause (iii), the Director shall notify as provided in clause (iv). The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d).

(3) *Stipulated probation.* In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional and the Board Chairman or Vice-Chairman approves, the Director and the lawyer may agree that the proceedings will be held in abeyance for a specified period up to two years and thereafter terminated, provided the lawyer throughout the period complies with specified reasonable conditions. At any time during the period, with the Board Chair-

man or Vice-Chairman's approval, the parties may agree to modify the agreement or to one extension of it for a specified period up to two additional years. The Director shall notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, of the agreement and any modification. The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d). The Director may reinstitute the underlying proceedings if the lawyer consents or a Panel determines that the lawyer has violated the conditions.

(4) *Submission to Panel.* The Director shall submit the matter to a Panel under Rule 9 if:

(i) In any matter, with or without a complaint, the Director concludes that public discipline is warranted;

(ii) The lawyer makes a demand under subdivision (c) (2) (iii);

(iii) The lawyer consents or a Panel determines that the lawyer has violated conditions under subdivision (c) (3); or

(iv) A Panel chairman so directs upon an appeal under subdivision (d).

(d) Complainant's appeal. If the complainant is not satisfied with the Director's disposition under Rule 8(c) (1), (2) or (3), he may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter to a Panel chairman by rotation. The Panel chairman may approve the Director's disposition or direct that the matter be submitted to a Panel other than his own.

(Amended July 22, 1982.)

Rule 9. Panel Proceedings

(a) Charges; Setting Pre-Hearing Meeting. If the matter is to be submitted to a Panel, the Director shall prepare

charges of unprofessional conduct, assign them to a Panel by rotation, schedule a pre-hearing meeting, and notify the lawyer of:

(1) The charges;

(2) The name, address, and telephone number of the Panel chairman and vice-chairman;

(3) The time and place of the pre-hearing meeting; and

(4) The lawyer's obligation to appear at the time set unless the meeting is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

(b) Admission of Charges. The lawyer may, if he so desires:

(1) Admit some or all charges; or

(2) Tender an admission of some or all charges conditioned upon a stated disposition.

If a lawyer makes such an admission or tender, the Director may proceed under Rule 10(b).

(c) Request for Admission. Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing meeting or within ten days thereafter. The Rules of Civil Procedure for the District Courts applicable to requests for admissions, govern except that the time for answers or objections is ten days and the Panel chairman or vice-chairman shall rule upon any objections, If a party fails to admit, the Panel may award expenses as permitted by the Rules of Civil Procedure for the District Courts.

(d) Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by initials in any District Court proceeding.

(e) Pre-Hearing Meeting. The Director and the lawyer shall attend a pre-hearing meeting. At the meeting:

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing;

(2) Each party shall mark and provide the other party a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission; and

(3) The parties shall prepare a pre-hearing statement.

(f) Setting Panel Hearing. Promptly after the pre-hearing meeting, the Director shall schedule a hearing by the Panel on the charges and notify the lawyer of:

(1) The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing; and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, of the pre-hearing statement, and, unless the parties agree or the Panel chairman or vice-chairman orders to the contrary, of all documentary exhibits marked at the pre-hearing meeting.

(g) Form of Evidence at Panel Hearing. The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for testimony by:

(1) The lawyer;

(2) A complainant who affirmatively desires to attend; and

(3) A witness whose testimony the Panel chairman or vice-chairman authorized for good cause.

If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by initials in any district court proceeding.

(h) Procedure at Panel Hearing. Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

(1) The Chairman shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on any charge, and that the Panel will terminate the hearing whenever it is satisfied that there is or is not such probable cause (or, if the Director has issued an admonition under Rule 8(c)(2), that the hearing's purpose is to determine whether the Panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court);

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which he proposes to offer thereon;

(3) The lawyer may respond to the Director's remarks;

(4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

(5) The parties may present oral arguments; and

(6) The Panel shall either recess to deliberate or take the matter under advisement.

(i) Disposition. After the hearing, the Panel shall either:

(1) Determine that there is not probable cause to believe that public discipline is warranted (or, if the Director has issued an admonition under Rule 8(c)(2), affirm or reverse the admonition); or

(2) If it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel shall not make a recommendation as to the matter's ultimate disposition.

(j) Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has the complaint, of the Panel's disposition. If the Panel did not determine that there was probable cause to believe that public discipline is warranted, the notification to the complainant, if any, shall inform him of his right to petition for review under subdivision (k).

(k) Complainant's Petition for Review. If the complainant is not satisfied with the Panel's disposition, he may within 14 days file with the clerk of the Supreme Court a petition for review. The clerk shall notify the respondent and the Board Chairman of the petition. The respondent shall be denominated by initials in the proceeding. This Court will grant the review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the

petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action, or take any other action as the interest of justice may require.

(l) Manner of Recording. Proceedings at a Panel hearing or deposition may be recorded by sound recording or audio-visual recording if the notification thereof so specifies. A party may nevertheless arrange for stenographic recording at his own expense.

(m) Panel Chairman Authority. Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel chairman or vice-chairman. For good cause shown, the Panel chairman or vice-chairman may shorten or enlarge time periods for discovery under this Rule.

(Amended July 22, 1982.)

Rule 13. Answer to Petition for Disciplinary Action

(a) Filing. Within 20 days after service of the petition, the respondent shall file an original and nine copies of an answer in this Court. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

Rule 14. Hearing on Petition for Disciplinary Action

(a) Referee. This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action.

(b) Conduct of hearing before referee. Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts

and the referee shall have all the powers of a district court judge.

(c) Record. The referee shall appoint a court reporter to make a record of the proceedings as in civil cases.

(d) Referee's Findings, Conclusions, and Recommendations. The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director of them. Unless the respondent or Director within five days orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. One ordering a transcript shall make satisfactory arrangements with the reporter for his payment. The reporter shall complete the transcript within 30 days.

(e) Hearing before Court. This Court within ten days of the referee's findings, conclusions, and recommendations, shall set a time for hearing before this Court. The order shall specify times for briefs and oral arguments. The matter shall be heard upon the record, briefs, and arguments.